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In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

WARREN S. GRIMES
Attorney
Federal Trade Commission
Washington, D.C. 20580

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission and its individual members, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 3a-22a) is reported at 596 F.2d 1381. The order of the district court (App. A, *infra*, 1a-2a) is not reported. The order of the Commission denying respondent's motion to dismiss the complaint (App. E, *infra*,

27a-28a) is not reported. The order of the Commission denying respondent's motion for reconsideration (App. E, *infra*, 29a-31a) is reported at 83 F.T.C. 1759.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1979. A petition for rehearing en banc was denied on August 6, 1979 (App. C, *infra*, 23a-24a). On October 29, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's deliberative process prior to issuing a facially valid administrative complaint stating that it has "reason to believe" that certain firms are engaged in unfair methods of competition, with supporting allegations, is a matter "committed to agency discretion by law" and thus not subject to judicial review under 5 U.S.C. 701(a)(2).

2. If the Commission's decision to issue an administrative complaint is not "committed to agency discretion by law," whether such action constitutes "final agency action" (5 U.S.C. 704) subject to immediate judicial review during the pendency of the ensuing administrative proceeding.

STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and the judicial re-

view provisions of the Administrative Procedure Act (5 U.S.C. 701-706) are set forth in Appendix D, *infra*, 25a-26a.

STATEMENT

1. The Federal Trade Commission is authorized by law to issue complaints initiating administrative proceedings whenever the Commission determines (1) that there is "reason to believe" that a company has been or is using an unfair method of competition, and (2) that such a proceeding would be in the public interest. 15 U.S.C. 45(b). On July 18, 1973, the Commission, through its Secretary, issued a certified administrative complaint charging that respondent Standard Oil Company of California and seven other major oil companies maintained a noncompetitive market structure and were therefore engaged in unfair methods of competition in violation of 15 U.S.C. 45(a). The complaint stated that the Commission had "reason to believe that the above-named respondents have violated and are now violating [15 U.S.C. 45]" and that formal adjudicatory proceedings with respect to the alleged violation would be "in the public interest" (R. 21).[1] The complaint contained allegations describing the manner in which respondent and the other named oil companies were said to be in violation of the law (R. 25-31).

In January 1974, respondent filed a motion to dismiss the administrative complaint, contending that the Commission had issued the complaint in response

[1] "R." refers to the record in the court of appeals.

to congressional pressure and without "reason to believe" that a violation had occurred and, further, that the proceeding was not in the public interest. The Commission denied the motion to dismiss (App. E, *infra*, 27a). It also denied a motion for reconsideration, on the ground that "[o]nce the Commission has resolved [the "reason to believe" and "public interest"] questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (App. E, *infra*, 30a).[2]

Following the denial of respondent's motions, the administrative proceeding went forward. The proceeding is still pending.

2. On May 1, 1975, respondent filed a civil action in the United States District Court for the Northern District of California, seeking an order compelling dismissal or withdrawal of the Commission's ad-

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[2] The Commission noted that both the adequacy of its determination that there is "reason to believe" that a violation of law has occurred and its belief that an adjudicatory proceeding is in the "public interest" are matters "that go to the mental processes of the Commissioners" and thus are not reviewable by the court (App. E, *infra*, 30a). In addition, the Commission observed that none of the communications received from members of Congress prior to the issuance of the complaint "is even remotely of the character deemed improper by the courts" (*id.* at 29a-30a, citing *e.g.*, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966)).

ministrative complaint (R. 1-18).[3] Respondent alleged that in issuing the administrative complaint the Commission had acted arbitrarily and capriciously without facts sufficient to support a reasonable belief that respondent had violated the law. Respondent further alleged that the Commission's initiation of administrative proceedings was the result of improper consideration of congressional pressure and legally irrelevant political and economic factors (R. 15).

The Commission moved to dismiss the action (R. 90). The district court concluded that the issuance of the administrative complaint by the Commission was not subject to judicial review (Tr. 60-61)[4] and, accordingly, granted the Commission's motion to dismiss (App. A, *infra*, 1a-2a).[5]

A divided panel of the court of appeals vacated the judgment of dismissal. The court acknowledged that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court" under the Administrative Pro-

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[3] The district court complaint named the Commission and its individual members as defendants.

[4] "Tr." refers to the transcript of the argument before the district court on the motion to dismiss the action.

[5] At the conclusion of oral argument, the district judge stated: "I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under the most unusual circumstances, would be productive of nothing more than chaos" (Tr. 60).

cedure Act (5 U.S.C. 701(a)(2)) (App. B, *infra*, 10a). Nevertheless, it ruled that judicial review is available with respect to whether the Commission had in fact made the requisite "reason to believe" determination, notwithstanding the recitation on the face of the administrative complaint that such a determination had been made (*id.* at 12a). The court viewed the "reason to believe" provision of 15 U.S.C. 45(b) as restricting the Commission's exercise of discretion to issue administrative complaints, and concluded that this restriction provides "law to apply" (*Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971)) to the Commission's action in issuing the complaint.

The court also concluded (*id.* at 14a-15a) that the issuance of the administrative complaint constituted "final agency action for which there is no other adequate remedy at law," and that such action is immediately reviewable in the district court under 5 U.S.C. 704. It reasoned that if respondent's claim were not subject to review at this stage of the proceedings it might never be reviewed, for the following reasons: (1) in the event that respondent were to prevail in the administrative proceeding, its challenge to the issuance of the complaint would be moot; (2) if respondent sought to raise its claim upon review of a final cease and desist order, the record of the administrative proceeding in all likelihood would be insufficient for this purpose because the Commission's rejection of respondent's claim would

have foreclosed respondent from developing relevant facts; and (3) a court reviewing a cease and desist order is limited to considering whether substantial evidence supports the order and does not review alleged defects in the filing of a complaint (*id.* at 14a-15a). The district court was directed to determine on remand whether the Commission made a "reason to believe" determination, or "whether the complaint was issued solely because of outside pressure or with complete absence of a 'reason to believe' determination" (*id.* at 14a).

Judge Carter dissented (App. B, *infra*, 15a-22a), on the ground that the Commission's action initiating an administrative proceeding is in essence an exercise of prosecutorial discretion and, as such, is exempted from judicial review under 5 U.S.C. 701(a)(2) (*id.* at 16a-18a).[6] He noted that judicial inquiry into whether the Commission in fact made a "reason to believe" determination would improperly require the courts to probe the mental processes of the Commissioners (*id.* at 18a). Even assuming that respondent's claim may ultimately be subject to review, Judge Carter concluded (*id.* at 20a-21a) that it is not reviewable while the administrative proceeding remains pending, since the issuance of an administrative complaint is merely a preliminary determination

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[6] Judge Carter noted that in rare cases judicial inquiry may be permitted into whether the prosecutor's conduct falls outside the range of his discretion, but concluded that no such facts have been pleaded by respondent in this case (App. B, *infra*, 17a).

and is not "final agency action" within the meaning of 5 U.S.C. 704. In addition, he observed (*id.* at 22a) that respondent had failed to make a showing of "irreparable injury" necessary to overcome the rule requiring exhaustion of administrative remedies before judicial review may be sought. He predicted that under the majority's ruling, "there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function" (*id.* at 18a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the application of the Administrative Procedure Act's judicial review provisions to discretionary and preliminary determinations by federal administrative agencies to institute adjudicatory proceedings. In ruling that respondent may obtain review of the Commission's decision to issue an administrative complaint, the court of appeals has undermined the discretionary function exception to judicial review of administrative action codified in 5 U.S.C. 701(a)(2). As this Court's recent decision in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979) demonstrates, the ruling below misapplies the standards for determining when administrative action is committed by law to the agency's unreviewable discretion.[7] The ruling would also require the courts to

[7] Although the court of appeals' ruling was issued before this Court's decision in *Southern Ry.*, the Commission brought the *Southern Ry.* opinion to the court's attention in its petition for rehearing en banc.

probe the Commissioners' mental processes, contrary to the principles established in *United States v. Morgan*, 313 U.S. 409, 422 (1941). Moreover, the interlocutory review authorized here threatens serious disruption to the administrative process, a disruption that Congress intended to avoid in enacting 5 U.S.C. 704.

The unprecedented decision of the court of appeals is contrary to accepted principles of administrative law and, if allowed to stand, would undermine the effective and orderly conduct of enforcement proceedings before many administrative agencies. Federal agencies initiate hundreds of administrative proceedings every year. As Judge Carter pointed out in dissent (App. B, *infra*, 18a), the decision of the court of appeals is an open invitation to respondents in administrative proceedings to engage in disruptive and dilatory litigation of ancillary procedural issues in the courts during the early stages of such proceedings.[8] The holding affects not only the Commission,[9] but numerous other administrative agencies,

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[8] Indeed, even the majority below conceded that judicial intervention in the administrative process "would serve only to hamper or thwart the FTC's exercise of its responsibilities" (App. B, *infra*, 11a). While the majority was here referring to review of the merits of the Commission's "reason to believe" decision, there is no workable distinction between review of the merits and review of whether the Commission "independently" made its determination. See pages 12-13, *infra*.

[9] The "reason to believe" standard applies not only to Commission administrative complaints issued pursuant to Section

since "reason to believe" is implied or expressed in many statutes conferring administrative discretion to initiate a complaint proceeding.[10] The questions presented by this case are therefore of substantial importance to the effective functioning of many administrative agencies.[11]

1. The Administrative Procedure Act provides no authority for judicial review of the Commission's

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5 of the FTC Act, but also to its attempts to obtain injunctive relief (15 U.S.C. 53(b)) or criminal penalties (15 U.S.C. 56(b)), and to enforcement of other statutes (15 U.S.C. 68e(b), 68h (Wool Products Labeling Act); 15 U.S.C. 69f (Fur Products Labeling Act); 15 U.S.C. 70e, 70f, 70i(b) (Textile Fiber Products Identification Act).

[10] Numerous other regulatory statutes provide that complaints shall be issued if the agency has "reason to believe" violations of law are occuring. *E.g.*, 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. 193, 292 (Secretary of Agriculture); 15 U.S.C. 21(b) (enforcement of the Clayton Act by ICC, FCC, CAB, Federal Reserve Board, and FTC); 15 U.S.C. 77j(b) (SEC's authority to issue order suspending use of prospectus and institute hearings); 15 U.S.C. 2064(g) (Consumer Product Safety Commission's authority to seek certain court relief); 42 U.S.C. 1973aa-2, 5309(c) (Attorney General's authority to bring certain civil rights enforcement actions); 42 U.S.C. 300h-3(c), 300j(e)(3) (EPA Administrator's authority to seek TRO or injunction). See 15 U.S.C. 77t(b), 78u(d) (authorizing the SEC to initiate court proceedings whenever it "appear[s] to the Commission" that violations of law are occurring). Cf. Fed. R. Civ. P. 11 (signing of pleading by attorney certifies that there is "good ground to support it").

[11] For these reasons, the general counsels of five agencies have written to the Solicitor General expressing concern about the harmful implications of the court of appeals' decision in this case. See App. F, *infra*, 32a-43a.

decision to issue an administrative complaint because the initiation of an enforcement proceeding is "agency action committed to agency discretion by law" (5 U.S.C. 701(a)(2)). The court below correctly held, under this provision, that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA" (App. B, *infra*, 10a). It distinguished, however, between the substance of the "reason to believe" determination itself, and the factual question whether the determination had been independently made by the Commission. The court concluded that as to the latter question, the "reason to believe" language in 15 U.S.C. 45(b) imposes a substantive legal restriction on the Commission's discretion to issue complaints which must be satisfied before the Commission acts; that this restriction provides "law to apply" within the meaning of *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); and that the discretionary function exception of 5 U.S.C. 701(a)(2) is therefore inapplicable (*id.* at 11a-12a).

Although the discretionary function exception is admittedly "very narrow" (*Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 410), the court of appeals' mechanistic application of the language from *Overton Park*, without further analysis, is inconsistent with this Court's decisions explaining when agency action involves unreviewable discretion. *E.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*,

supra; *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960). "Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins*, 397 U.S. 159, 165 (1970). See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Thus, judicial review of agency action is foreclosed by 5 U.S.C. 701(a)(2) to the extent that the substantive statute reflects Congress' intent to vest in the administrative agency unreviewable discretion to exercise particular functions. Determination of such an intent depends on the language, structure and legislative history of the substantive statute, and decisions under analogous statutes. *Southern Ry.* v. *Seaboard Allied Milling Corp.*, *supra*, slip op. 17. The court of appeals failed to engage in this necessary analysis.

To begin with, the language and design of 15 U.S.C. 45(b) indicate that Congress intended the Commission's initiation of administrative proceedings to be unreviewable. The majority below conceded that a "reason to believe" determination by the Commission—including whether the Commission had an adequate factual basis for its allegations—is itself purely discretionary and thus unreviewable. It distinguished, however, between the abstract merits of the determination and whether the determination had been independently made by the Commission. But, for purposes of judicial review, there is no

meaningful distinction in the statute between the Commission's making of a determination that it has "reason to believe" that a violation has occurred, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief.[12] The statute provides that "[w]henever the Commission shall have reason to believe that any * * * corporation * * * is using any unfair method of competition [in respect to which a proceeding would be in the public interest], it shall issue and serve * * * a complaint stating its charges *in that respect* * * *. 15 U.S.C. 45(b) (emphasis added). The Commission determines that it has adequate reasons to initiate a proceeding when it concludes that the allegations in a proposed complaint are sufficient to warrant the initiation of a proceeding; it then directs its Secretary to issue the complaint. "Reason to believe" is thus inextricably linked to the Commission's undisputed responsibility to decide what kinds of business conduct may be unfair within the meaning of the statute. The statutory language and structure thus reflect an unambiguous intent to confer the widest discretion on the Commission to initiate complaints, for the Commission alone is empowered to

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[12] Moreover, if such a distinction were accepted, the reviewing court would be required to go behind the face of a certified and facially valid complaint. Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence).

determine in the first instance whether a method of competition or an act or practice is unfair.[13]

Moreover, the legislative history of the Federal Trade Commission Act also supports nonreviewability. The "reason to believe" language was inserted into 15 U.S.C. 45 by the Senate Committee on Interstate Commerce. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). The committee report did not discuss the "reason to believe" standard as such. But it stressed the need for "wide discretion" in the conduct of investigations to avoid hampering administration of the Act, noting that "to almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry" (*id.* at 12).[14] To permit judicial review, particularly while the administrative proceeding is still in progress (see pages 17-21, *infra*), would frustrate the objectives of Congress in enacting the statute.

In addition, decisions in analogous cases strongly support our contention that the decision whether the

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[13] See, *e.g.*, *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *United States* v. *Morton Salt*, 338 U.S. 632, 640 (1950); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); cf. *FTC* v. *Sperry Hutchinson Co.*, 405 U.S. 233 (1972).

[14] Contemporaneous construction also reflects an understanding that the Commission's initiation of proceedings is not subject to review. A commentator reviewing the first decade of the Act's administration noted that no procedure existed to put in issue the sufficiency of the Commission's reasons to believe that a violation had occurred. G. Henderson, *The Federal Trade Commission Act* 49-50 (1924).

Commission should initiate a proceeding is committed to the agency's discretion and is therefore not reviewable. As Judge Carter observed in dissent (App. B, *infra*, 17a), "judicial review of prosecutorial discretion in the administrative area is generally rejected," whether the agency's decision is in favor of, or against, prosecution. Thus, the General Counsel of National Labor Relations Board has unreviewable discretion in deciding whether to issue, or deny, an unfair labor practice complaint. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); cf. *Southern Ry.* v. *Allied Seaboard Milling Corp.*, *supra* (ICC has unreviewable discretion whether to suspend and investigate railroad tariff); *Morris* v. *Gresette*, *supra* (Attorney General has unreviewable discretion whether to object to a State's change in its election laws under Voting Rights Act). The Commission's discretion is equally broad. See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).[15] If, as the court below has held, reason to believe is a separate, reviewable legal requirement, complaining consumers and competitors disappointed by the Commission's failure

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[15] While the discretion to institute administrative proceedings, like the discretion to bring criminal charges, is extremely broad, "there are undoubtedly constitutional limits on its exercise." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978). Thus, a claim that the Due Process Clause was violated because the decision to issue a complaint was based upon an unjustifiable standard such as race, religion, or other arbitrary classification would be subject to judicial review after issuance of a final order (see note 17, *infra*).

to initiate a proceeding presumably could, like respondent, claim a right to judicial review of whether the Commission had made an independent "reason to believe" determination on their grievance. It has long been held, however, that denial of such a request is final and unreviewable. *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929).

Finally, judicial review of whether the Commission in fact made a "reason to believe" determination would, as Judge Carter pointed out (App. B, *infra*, 18a), require the courts to inquire into the mental processes of the Commissioners. Such an inquiry would impair the integrity of the administrative process. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). The collegial nature of the decision-making process in the Commission and similar agencies exacerbates the impropriety of such an inquiry. In this case the district court would have to assess the deliberations of five individuals, only one of whom is currently a member of the Commission,[16] to determine, among other things, whether, and to what extent, their collective determination was influenced by congressional pressure. The very nature of this inquiry strongly indicates that whether the commission "independently" made a "reason to believe" determination is a matter that Congress has committed to agency discretion and is thus unreviewable under 5 U.S.C. 701(a)(2).

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[16] At the time of the administrative complaint, only present Commissioner Dixon was a member of the Commission.

2. The court of appeals' holding that the issuance of an administrative complaint is "final agency action" within the meaning of 5 U.S.C. 704 independently warrants this Court's consideration. Even if it is assumed that the Commission's decision to issue a complaint is ultimately subject to judicial review (but see pages 10-16, *supra*), by permitting immediate interlocutory review of that question the court of appeals has seriously departed from the statutory scheme established by Congress for review of Commission actions. Moreover, the court appears to have disregarded this Court's decisions expressing the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

Under 15 U.S.C. 45(c), any party subject to a cease and desist order issued by the Commission may, at the conclusion of the administrative proceeding, petition the court of appeals for review. In enacting that subsection, Congress provided a particular method for judicial review of the Commission's orders. This procedure is exclusive, for where Congress "has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965);

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The decision so to limit judicial review reflects a policy choice by Congress designed to forestall piecemeal litigation and disruption of the administrative process. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 600-602 (1950); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-384, 385 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*.

The court of appeals disregarded its duty to respect that choice. Cf. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). It held (App. B, *infra*, 14a) that immediate interlocutory review was available in the district court because, under 5 U.S.C. 704, eventual review in the court of appeals of a future cease and desist order would not be an "adequate remedy." But as Judge Carter correctly concluded (*id.* at 20a-21a), the "no other adequate remedy" provision in 5 U.S.C. 704 "was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt 'final agency action' from judicial review under the APA if there is an adequate alternative legal remedy."

Furthermore, if the court of appeals was correct in holding that the "reason to believe" standard is a judicially enforceable restriction on the Commission's discretion, there is no reason why the propriety of the issuance of the complaint could not await review of any cease and desist order ultimately issued

by the Commission.[17] Nor would a post-proceeding review be inadequate because respondent has been denied an opportunity to make a record on its claim that the complaint was improperly issued. Such an argument in favor of interlocutory review would apply with equal force to every ruling made by the agency in the course of the proceeding that limits the admissibility of evidence. If the Commission errs in such rulings, so that the agency record is inadequate on any reviewable issue, the court of appeals may either remand the proceeding to the Commission for supplementation of the record, or modify or set aside the Commission's order, with or without remand as appropriate. 15 U.S.C. 45(c); 5 U.S.C. 705. Ultimately it is the Commission that must bear the risk that a court "will reverse its final order, condemn its proceeding as so much waste motion and order that the proceeding be conducted over again * * *." *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970) (*per curiam*).

Moreover, the court's conclusion that respondent is entitled to immediate review because its challenge to the issuance of the complaint may become moot (if

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[17] The Court has held, for example, that if the Commission attempts to enforce a private claim for unfair competition, in violation of the requirement in 15 U.S.C. 45(b) that its proceeding be in the public interest, the defect may be raised in proceedings to enforce the Commission's final order. *FTC* v. *Klesner, supra*, 280 U.S. at 29-30. Similarly, a claim of discriminatory enforcement may be reviewed on petition to the court of appeals from the final order. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251-252 (1967).

respondent prevails in the administrative proceeding) ignores one of the basic purposes of the exhaustion doctrine—the avoidance of unnecessary judicial consideration of preliminary or procedural rulings entered in the course of an administrative proceeding. See *McKart* v. *United States*, 395 U.S. 185, 192-195 (1969); *McGee* v. *United States*, 402 U.S. 479, 484 (1971); *Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972). The court of appeals' mootness analysis would read the requirement for exhaustion of remedies out of the law, since its analysis necessarily would apply to every adverse interlocutory ruling made in the course of any administrative proceeding that might terminate in favor of the respondent party.[18]

Finally, the court of appeals has ignored the principle that "without a clear showing of irreparable injury, failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process." *Renegotiation Board* v. *BannerCraft Co.*, 415 U.S. 1, 24 (1974). No such injury results from the requirement that a party respond to an administrative complaint, even though litigation expenses may be substantial and unrecoverable and the conduct of litigation burdensome and inconvenient. "The expense and annoyance of litigation is 'part of the

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[18] See *Chamber of Commerce* v. *FTC*, 280 Fed. 45, 48-49 (8th Cir. 1922), holding that the courts have no authority to entertain interlocutory challenges to the Commission's jurisdiction. This decision was cited approvingly in *FPC* v. *Metropolitan Edison Co., supra*, 304 U.S. at 385.

social burden of living under government.'" *Petroleum Exploration Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938); *Renegotiation Board* v. *BannerCraft Co.*, *supra*, 415 U.S. at 24; *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 51-52.[19]

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[19] The court of appeals incorrectly relied (App. B, *infra*, 14a) on *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) in support of its "irreparable injury" ruling. The decision in *Eldridge* "merely adhered to the well-established principle that when constitutional questions are in issue, the availabiilty of judicial review is presumed, and [this Court] will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Califano* v. *Sanders*, *supra*, 430 U.S. at 109. The question whether the Commission made an "independent" "reason to believe" determination is clearly not of constitutional scope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

WARREN S. GRIMES
Attorney
Federal Trade Commission

DECEMBER 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Civil No. C-75-0860-LHB

[Filed Oct. 3, 1975]

ORDER OF DISMISSAL

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF.

v.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; M. ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS.

This action having come regularly on for hearing before the Court on the defendants' motion to dismiss on the grounds the plaintiff has failed to state a claim upon which relief can be granted, and

The Court having considered the pleadings and heard argument of the respective parties, and the matter having been duly submitted,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss be and it is hereby granted;

2. The complaint and action are hereby dismissed; and

3. The respective parties shall bear their own costs herein.

Dated:

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Judge

Approval as to Form.

GEORGE A. SEARS
Attorney for Plaintiff

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 75-3678

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT,

v.

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES.

May 18, 1979

Appeal from the United States District Court for the Northern District of California.

Before ELY, CARTER and TANG, Circuit Judges.

TANG, Circuit Judge.

Standard Oil Company of California (SOCAL) appeals from a judgment dismissing an action in which SOCAL sought review of certain aspects of the Federal Trade Commission's (FTC) decision to issue an administrative complaint under § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975). The issue raised is to what extent the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), allow the district court to review the FTC's stated determination that it has "reason to believe" that SOCAL

is engaged in monopolistic practices in violation of law. Under 15 U.S.C. § 45(b), this "reason to believe" determination is a prerequisite to the issuance of an FTC complaint.[1] We conclude here that what constitutes "reason to believe" is unreviewable because the "reason to believe" determination is committed to the FTC's discretion. However, we also conclude that the issue whether the FTC did or did not in fact make a "reason to believe" determination is reviewable.

FACTS

Because SOCAL's complaint was dismissed for failure to state a claim upon which relief can be granted, the following facts alleged in SOCAL's complaint must be accepted as true. *East Oakland-Fruitvale Planning Council* v. *Rumsford*, 471 F.2d 524, 527 (9th Cir. 1972).

In December 1971, the FTC issued a resolution stating its intention to investigate whether the petroleum industry was engaged in unfair trade practices. Seventeen months passed and the FTC made no ap-

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[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975), provides as relevant:

> Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

parent effort to investigate SOCAL either through examination of its officers or employees or through review of corporate records. Then, on May 31, 1973, Senator Henry M. Jackson, Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigation Subcommittee of the Senate Committee on Government Operations, sent a letter to FTC Chairman, Lewis A. Engman, requesting that, within 30 days, the FTC provide a report on the relation between the petroleum and related industries and the current and prospective shortages of petroleum products. One day after the letter was sent, the FTC issued subpoenas to three SOCAL officers and shortly thereafter on July 6, 1973, the FTC issued SOCAL a subpoena duces tecum to produce certain corporate books and records.

On July 6, 1973, the FTC also responded to Senator Jackson's request for a report by transmitting to him an undated document entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." Chairman Engman's letter accompanying the report stated: "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission."

On July 13, Senator Jackson released the preliminary FTC report for publication as a committee print. In the week folowing, the FTC issued complaint number 8934 charging SOCAL and seven other oil companies with various antitrust violations. However,

just two days prior to Senator Jackson's release of the report for publication, Chairman Engman had warned that publication of the report would be "inconsistent with [the FTC's] duty to proceed judiciously and responsibly" in determining what, if any, further action should be taken by the FTC.

Prior to the filing of its district court complaint, SOCAL sought relief in the administrative proceeding. In January 1974, SOCAL filed a motion in the FTC proceeding for dismissal of the complaint without prejudice. It argued that Congressional pressure alone had led to the premature termination of the FTC investigation and that the FTC had issued the complaint without "reason to believe" SOCAL had committed a violation. In February, after an administrative law judge certified SOCAL's motion to the FTC, the motion was denied. Later the FTC refused SOCAL's motion for reconsideration.

This action was filed in May 1975. SOCAL prayed that the district court compel the FTC to withdraw or dismiss the administrative complaint. SOCAL claimed that the FTC had arbitrarily and capriciously issued the complaint without facts sufficient to warrant a reasonable belief that SOCAL had violated the law. SOCAL also claimed that, in deciding to issue the complaint, the FTC had improperly considered Congressional pressure and legally irrelevant political and economic factors.

SOCAL also pleaded other facts to support its claim that the agency lacked "reason to believe" SOCAL had violated the Act. For example, counsel

for the FTC was unable to provide a satisfactory list of witnesses or documents as ordered by the administrative law judge. Apparently, the FTC did not have even one proposed witness to be called in the proceeding. Also, in light of the FTC's discovery problems, the administrative law judge had recommended in October 1974 that the FTC withdraw the complaint pending further investigation. The FTC rejected this suggestion.

In sum, SOCAL claimed that the FTC had abused its power to issue complaints under 15 U.S.C. § 45 (b). The district court, however, dismissed SOCAL's action on grounds that it did not have authority to inquire into what constituted "reason to believe" under 15 U.S.C. § 45(b).

DISCUSSION

SOCAL argues that it is entitled to relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The FTC is an agency subject to the APA. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Moreover, as SOCAL pleaded, the district court had jurisdiction under 28 U.S.C. § 1331. *See Califano* v. *Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed2d 192 (1977).

Nevertheless, the FTC claims that the issuance of the administrative complaint is not within the purview of the APA because it is not "agency action"

under 5 U.S.C. §§ 551(13) and 702.[2] We disagree. The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Consequently, the APA's generous review provisions are given a hospitable interpretation. *Id.* at 140-41, 87 S.Ct. 1507. There is also a presumption of judicial review under the APA unless there is clear and convincing evidence that Congress intended to foreclose review of a final agency action either by a specific statute or by committing action to agency discretion. *See, e.g., Morris* v. *Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 140, 87 S.Ct. 1507; *Washington* v. *United States Environmental Protection Agency*, 573 F.2d 583, 587 (9th Cir.

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[2] The cited statutes provide as relevant:

> "[A]gency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 551(13).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702.

1978); *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F.2d 1165, 1168 (9th Cir. 1975). Therefore, the relevant question is not whether the FTC's issuance of complaint number 8934 is "agency action" as to SOCAL—for almost any act an agency takes can be "agency action"—but whether, under the APA, it is reviewable agency action. The latter inquiry triggers the following questions: first, whether a statute precludes judicial review, 5 U.S.C. § 701(a)(I); second, whether agency action is committed to agency discretion by law, 5 U.S.C. § 701(a)(2); and third, whether there is final agency action for which there is no adequate judicial remedy other than review under the APA.[3]

There is no statute precluding judicial review of the FTC's determination that there is "reason to believe" the charged party has violated the law. Therefore, inquiry proceeds to whether the "reason to believe" determination lies entirely within the FTC's discretion. 5 U.S.C. § 701(a)(2). The

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[3] The cited statutes provide as relevant:

> This chapter [5 U.S.C. §§ 701-706] applies, according to the provisions thereof, except to the extent that —
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

APA's exception for actions committed to agency discretion applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). When no law fetters the exercise of discretion, the courts have no standard by which to measure the lawfulness of agency action, and consequently, the action is not susceptible to judicial review. *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), *cert denied*, —— U.S. ——, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Under this standard, a determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA. In *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926), this Court stated that a determination that an FTC complaint would be in the public interest, like the determination that there is "reason to believe" the law has been violated, lies within the FTC's discretion. Later case law upholds the validity of this early statement. Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. *See, Atlantic Refining Co.* v. *Federal*

Trade Commission, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term "unfair" is the power to determine whether there is "reason to believe" that a party is engaged in "unfair" conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

However, the facts alleged in SOCAL's complaint do not allow inquiry to end with our conclusion that the determination of what constitutes "reason to believe" is committed to the FTC's discretion. The rule of *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, provides that judicial review is foreclosed when there is no law to apply in a "given case." Accordingly, a complaint in a given case must be examined to see whether it raises claims for which there is law to apply. *Strickland* v. *Morton*, 519 F.2d 467, 471 (9th Cir. 1975). In this respect, the courts will review an agency action when the alleged abuse of discretion is the violation of "constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975). *See also City of Santa Clara* v. *Andrus*, *supra*, 572 F.2d at 666. Such issues must be reviewed "though other aspects of the agency action

may be committed to the agency's expertise and discretion." *East Oakland-Fruitvale Planning Council* v. *Rumsford, supra*, 471 F.2d at 533.

Under the above standard, there is a reviewable issue in this case. A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a "reason to believe" determination that the law has been violated. *See Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides "law to apply" in this case because SOCAL claims that the FTC disregarded the restriction and acted outside the term of the statute. SOCAL claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of SOCAL and under the pressure of outside influences. In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made.

The allegations in SOCAL's complaint and the reasonable inferences from the allegations support SOCAL's claim. As alleged, no investigation of SOCAL occurred for 17 months after the FTC had resolved to investigate the petroleum industry. Then, immediately after the reception of Senator Jackson's request, the FTC took the testimony of three SOCAL

officers. Shortly thereafter, the FTC subpoenaed SOCAL records. But at the same time the subpoena issued, the FTC sent Congress a report which, as FTC Chairman Engman expressly stated, had not been evaluated or approved by the FTC. Chairman Engman also stated that publication of the report would be inconsistent with the FTC's duty to proceed judiciously and responsibly. Nonetheless, within a few days of publication, complaint number 8934 issued naming SOCAL as a respondent. All the above described events occurred in the brief period May 30 to July 18, 1973. Moreover, after administrative proceedings on the complaint had commenced, the FTC ran into severe discovery difficulties. This led the administrative law judge to suggest that the FTC might wish to consider dismissing the complaint so that a fuller investigation could take place.

Considering the alleged timing and circumstances, SOCAL's allegations are sufficient to raise the claim that the FTC either acted without deliberation as to SOCAL or felt itself goaded into action by outside influences. Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), SOCAL's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes "reason to believe" but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a "reason to believe" determination at all.

If the district court finds as a fact that the FTC made the "reason to believe" determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure or with complete absence of a "reason to believe" determination, then the FTC has not complied with the Act.

We must further determine whether there has been a "final agency action" as to SOCAL for which there is no adequate judicial remedy other than review under the APA. The finality element in 5 U.S.C. § 704 should be interpreted in a "pragmatic" way. *Abbott Laboratories* v. *Gardner, supra*, 387 U.S. at 149, 87 S.Ct. 1507. If possible, statutory finality requirements in general should not be construed so as "to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 901, 47 L.Ed. 18 (1976). In this case, SOCAL has exhausted administrative remedies by raising its claim before the FTC. SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable. Moreover, assuming that a court of ap-

peals could properly entertain SOCAL's present claims upon review of a cease and desist order under 15 U.S.C. § 45(c), it is unlikely that the record of the completed administrative proceedings would be sufficient to determine the claims for the simple reason that the FTC has already rejected them on legal grounds and thus foreclosed SOCAL from developing relevant facts. Furthermore, an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and, therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint. 15 U.S.C. § 45(c); *Atlantic Refining Co.* v. *Federal Trade Commission, supra,* 381 U.S. at 367-68, S.Ct. 1498. We therefore find that the issuance of the FTC complaint number 8934 was a "final agency action" as to SOCAL.

CONCLUSION

The judgment of the district court is vacated and the case is remanded for proceedings consistent with this opinion.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

(1) I concur in that portion of Judge Tang's opinion holding that a determination by the Federal Trade Commission (hereafter "FTC") that there is "reason to believe" a violation of law has occurred, is within the agency's discretion and not reviewable in

the district court under the Administrative Procedure Act (hereafter "APA"). (2) I dissent from the holding that there is reviewable by the court the question as to whether the FTC did or did not make a "reason to believe" determination. (3) I also dissent from the holding that FTC's action was "final action" and thus reviewable.

The Remand to Determine if the FTC Made a Determination

The opinion should have ended after point (1) above. In my opinion the discussion of the additional points (2) and (3) above referred to is foreclosed by what the majority decided as to the first point. If the "reason to believe" decision is not reviewable, then it seems wrong to me to decide whether the FTC did or did not make a "reason to believe" determination is reviewable. Had the first point been decided otherwise, namely, that the determination as to "reason to believe" a violation had occurred was reviewable, then, of course, it would follow there could be reviewed also the question as to whether or not the FTC did actually make a "reason to believe" determination. But since the majority held that the "reason to believe" decision was not reviewable but rested in agency discretion, it seems wrong to me to hold, as the majority does, as to the second point.

The government's brief demonstrates the rule that action by the FTC in starting a proceeding is agency action committed to agency discretion. The law is

based upon the general theory of prosecutorial discretion and the APA exception for agency discretion. Thus judicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories, Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S.App.D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's decision is against prosecution (*e. g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmiller* v. *SEC*, 160 U.S.App.D.C. 375, 379, 492 F.2d 641, 645 (1974)).

In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

In *Hills-Bros.* v. *FTC*, *supra*, this circuit held that notwithstanding the "reason to believe" standard in the FTC Act, the discretion of the FTC to issue complaints was no different from other generally non-reviewable prosecutorial determinations. It held it

was not necessary for the FTC to list its specific grounds for its "reason to believe."

Although the APA was enacted in 1946, the provision for exceptions from judicial review "agency action . . . committed to agency discretion by law" was a restatement of existing law. See "Administrative Procedure Act, Legislative History," S.Doc. 248, 79th Congress, 2d Session, 229-30 (1946). Thus the principles set forth in *Hills Bros.* in 1926 were reaffirmed by Congress when it enacted the APA in 1946.

Finally, judicial review of whether FTC made a determination of "reason to believe," etc., would require courts to probe the mental processes of the Commissioners, a procedure disapproved in *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

The decision in the case at hand as to the second point, allowing review to determine if the FTC actually made a determination of "reason to believe," would open a can of worms and lead to various appeals of preliminary acts and orders. The decision is incorrect and inconsistent with the prior holding that the "reason to believe" decision is action committed to agency discretion and not reviewable by this court.

With the slight opening for review provided by the second point of this decision, I foresee that there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function.

I would hold that since determination of the "reason to believe" issue was committed to agency discretion and exempted from judicial review under 5 U.S.C. § 701(a)(2), and since nothing in plaintiff's district court complaint creates any genuine issue as to the regularity of the Commission's complaint, judicial review of the Commission's decision to issue the complaint is unwarranted and improper.

Final Agency Action Under 5 U.S.C. § 704

The majority also holds that the action of the FTC was final agency action under 5 U.S.C. § 704 (point (3), *supra*). I disagree. The review of the Commission's proceedings should await the final action of the Commission.

In *Gifford-Hill & Co.* v. *FTC*, 173 U.S. App.D.C. 135, 137, 523 F.2d 730, 732 (1975), the court held that a "decision [by the FTC] to institute an adjudicatory proceeding is not an 'agency action'—and most certainly not a 'final agency action'—made reviewable by the [Administrative Procedure Act]." *See also Miles Laboratories* v. *FTC*, 78 U.S. App.D.C. 326, 328, 140 F.2d 683, 685, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 88 L.Ed. 1582 (1944).

In *Chamber of Commerce* v. *FTC*, 280 F. 45 (8 Cir. 1922) the FTC filed a complaint alleging that the Commission had reason to believe that petitioners were engaging in unfair competition. The petitioners sought judicial review of the issuance of the complaint. The court of appeals held that "neither the District Court nor this court has power under the act

[FTC] to interfere with the investigation and inquiry of the Commission" (*id.*, p. 48), and dismissed the action. The court's holding was specifically approved by the Supreme Court in *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222, n. 21, 58 S.Ct. 834, 82 L.Ed. 1294 (1938) and in *Federal Power Comm'n* v. *Edison Company*, 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

Plaintiff contends that the issue of the administrative complaint should be treated as "final" under 5 U.S.C. § 704 and that exhaustion of administrative remedies should not be required, because, in the absence of judicial review at the preliminary stage, the validity of the issuance of the administrative complaint cannot later be reviewed or becomes moot. Plaintiff contends that if the complaint is ultimately dismissed by the Commission, there would be nothing to review; that if the proceedings ultimately result in a cease and desist order, a review is limited to the validity of that order and does not extend to the propriety of the issuance of the underlying complaint, citing *Hills Bros.* v. *FTC, supra* (9 F.2d at 484). Thus plaintiff argues that the issuance of the administrative complaint should be deemed "final" for review purposes because, otherwise, there would be "no adequate remedy in a court" for a review of the matter.

The contention is without merit. The issuance of the complaint is a preliminary agency determination and not "final" in any effective sense. Plain-

tiff's argument is based on a misconception of the purpose and meaning of the "no other remedy" provision in 5 U.S.C. § 704. That provision or condition was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt "final agency action" from judicial review under the APA if there is an adequate alternative legal remedy. *See, e. g., Warner* v. *Cox*, 487 F.2d 1301, 1304 (5 Cir. 1974). *See generally Richfield Oil Corporation* v. *United States*, 207 F.2d 864, 869, 870 (9 Cir. 1953).

Plaintiff's remedy, which is an adequate one, is to test the validity of the final effective agency action. The cease and desist order is subject to judicial review and the findings of the Commission must be supported by substantial evidence.

Plaintiff is seeking an exception to the rule requiring exhaustion of administrative remedies. APA's limitation of judicial review to cases involving "final agency action" is a codification of the "exhaustion" rule. The rule is justified by "very practical notions of judicial efficiency . . . ." *McKart* v. *United States*, 395 U.S. 185, 194, 195, 89 S.Ct. 1657, 1663, 23 L.Ed. 2d 194 (1969).

Legal expenses in pursuing defenses to administration action (or remedies) is not a sufficient reason to avoid the exhaustion requirement. *Petroleum Exploration Inc., supra* (304 U.S. 209, 222, 58 S.Ct. 963, 82 L.Ed. 1408).

> "To permit judicial review . . . . of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays . . . and would render orderly administrative proceedings impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies." *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 69 App.D.C. 338, 339, 101 F.2d 426, 432 (1938).

Exceptions to the exhaustion doctrine apply only in "very unusual and limited circumstances," *Lone Star Cement Corp.* v. *FTC*, 339 F.2d 505, 510 (9 Cir. 1964); and require, for one thing, a showing of substantial prejudice, *i.e.*, "irreparable injury." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *McKart* v. *United States, supra* (395 U.S. at 197, 89 S.Ct. 1657) (incarceration). No irreparable injury to plaintiff is shown in this case.

The decision should be limited to the first point referred to above. I would affirm on that basis alone.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-3678

[Filed Aug. 6, 1979]

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT

vs.

FEDERAL TRADE COMMISSION: LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member; MARY ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES

ORDER

Before: ELY, CARTER and TANG, Circuit Judges

The majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Judge Carter votes to grant the petition for rehearing and recommends granting the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

STATUTES

1. 15 U.S.C. 45 provides in pertinent part:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein at least thirty days after the service of said complaint. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *.

2. 5 U.S.C. 701 provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> * * * *

3. 5 U.S.C. 703 provides in pertinent part:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action * * *
>
> Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

4. 5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.
>
> * * * *

APPENDIX E

BEFORE FEDERAL TRADE COMMISSION
UNITED STATES OF AMERICA

Commissioners: Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford

Docket No. 8934

IN THE MATTER OF

EXXON CORPORATION
a corporation, ET AL.

ORDER DENYING MOTION TO DISMISS

By motion to the administrative law judge dated January 2, 1974, respondent, Standard Oil Company of California, requested, among other things, dismissal of the complaint herein. The administrative law judge at first denied this request but subsequently, upon respondent's motion, he certified this matter to the Commission. He also certified certain motions to dismiss which were made and denied at the prehearing conference held December 18, 1973. (Tr. 99-100). This action was proper because respondents' motions raise questions regarding the Commission's exercise of its administrative discretion which involve considerations outside the judge's adjudicative authority. *Crush International Limited*, 80 F.T.C. 1023 (1972).

Upon consideration of respondents' motions to dismiss the Commission finds no reason to reconsider its decision to issue this complaint. Accordingly,

IT IS ORDERED that the aforesaid motions be, and they hereby are, denied.

By the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: February 12, 1974

IN THE MATTER OF
EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, June 4, 1974

Order denying respondents' motions for reconsideration of Commission's prior denial of respondents' motions to dismiss complaint.

ORDER DENYING RECONSIDERATION

By order dated February 1, 1974, the administrative law judge properly certified to the Commission certain oral and written motions to dismiss the complaint in this matter on the grounds that (1) the Commission lacked reason to believe respondents had violated the law at the time it issued the complaint and (2) the proceeding is not in the public interest. The Commission denied these motions by order of February 12, 1974, and respondents now urge reconsideration on those same grounds and, in addition, on an alleged denial of due process and the fact that complaint counsel are pursuing additional post-complaint investigation. Complaint counsel urge the Commission to grant the request for reconsideration and clarify its policy in the area of post-complaint investigations.

Respondents' argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications received by this agency from any mem-

ber of Congress is even remotely of the character deemed improper by the courts. *Pillsbury* v. *FTC*, 354 F. 2d 952 (5th Cir. 1966); *D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter.

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is en-

tirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, *e.g.*, definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts.

The Commision finds no grounds here for reconsidering its prior denial of respondents' motions to dismiss the complaint in this mater. Accordingly,

It is ordered, That respondents' motions for reconsideration be, and they hereby are, denied.

Commissioner Nye did not participate.

APPENDIX F

October 23, 1979

The Honorable Wade McCree, Jr.
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

Dear Sir:

We understand that the Federal Trade Commission, by letter dated September 21, 1979, has requested that you file a petition for a writ of certiorari in the case of *Standard Oil Co. of California* v. *Federal Trade Commission*, 596 F.2d 1381 (9th Cir. 1979). We urge that you grant that request.

Standard Oil holds that the Federal Trade Commission's decision to issue an administrative complaint is "final agency action," subject to immediate court review under the Administrative Procedure Act. The opinion strongly implies that the district court may conduct, at this stage of the proceedings, an extensive review of FTC actions leading up to the complaint, including the amount of evidence presented to the Commission and the Commissioners' reasons for approving the action.[1] Although the case

---

[1] The FTC statute at issue, 15 U.S.C. § 45(b), states: "whenever the Commission shall have *reason to believe* that any * * * corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * * it shall issue and serve upon such * * * corporation a complaint * * *" (emphasis added). This language is similar to the standard for instituting administrative proceedings in the statutes of various federal agencies. *See, e.g.*, Section 10(b) of the Securities Act of 1933, 15 U.S.C. § 77(b).

admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it, and should be limited to its facts, the court's reasoning is contrary to basic principles of administrative law, generally applicable to other agencies. In addition, we are concerned that the court's opinion is susceptible to various interpretations that could have an adverse impact on the administrative processes of other agencies in other contexts. The legal bases for our concern over these holdings are presented in detail below. But we wish to emphasize at the outset that our concerns are grounded in one very practical consideration: by opening administrative proceedings to such extensive review, and at such an early stage, this opinion threatens to affect adversely the law enforcement efforts of many administrative agencies.

Finality

The majority opinion in *Standard Oil* concluded that the FTC's decision to issue a complaint pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, was "final agency action," immediately reviewable under the APA. In this respect, the opinion represents a significant departure from the settled doctrine requiring exhaustion of administrative remedies. The majority based its conclusion upon a concern that, unless the FTC's action was held final and reviewable at this stage, "crucial collateral claims [would] be lost and potentially irreparable injuries [would] be suffered," *citing Mathews* v.

Eldridge, 424 U.S. 319, 331 n.11. But, neither Standard Oil Company nor the court has identified any meaningful injury that would befall the company if judicial review were withheld at this time; nor have they properly analyzed whether the company's "collateral claims" would be lost.

The only suggested "injury" Standard Oil might suffer from foregoing interlocutory judicial review is the trouble and expense of responding to the administrative complaint. Numerous cases have held, some of them in rather strong terms, that this trouble and expense do not rise to the level of a legally recognizable "injury." *See, e.g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938); *Small* v. *Kiley*, 567 F.2d 163, 165 (2d Cir. 1977) (per curiam). The only exception to this principle arises where the expense or burden of complying with the order for a hearing is extraordinary or disproportionate to the business of the respondent. *Petroluem Exploration Inc.* v. *Public Service Commission*, 304 U.S. 209, 220 (1938); *Sears, Roebuck & Co.* v. *NLRB*, 473 F.2d 91, 93 n.3 (D.C. Cir. 1972), *cert. denied*, 415 U.S. 950 (1974). There is certainly no suggestion that this is true in the present case.

Nor would Standard Oil lose forever the opportunity to obtain meaningful review of its "crucial collateral claims" if the court were to deny the company relief at this stage. The APA makes clear that any claimed illegality in the issuance of the complaint may be reviewed upon completion of the action, un-

less the matter is one committed exclusively to the agency's discretion.[2]

The panel majority also expresses a concern that because of the posture of this case, Standard Oil may not be able to develop the record necessary to a proper review of the "reason to believe" issue on appeal. But if the case were to arrive in the court of appeals with a record that was inadequate because the agency had made an error of substantive law, the court likely would remand it to the agency to further develop the record. Indeed, the section of the FTC Act here in question specifically allows for such a

---

[2] "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." 5 U.S.C. § 704. The reviewing court

> "shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (C) in excess of statutory jurisdiction, authority, or limitations, * * *; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706.

The majority relies upon *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367-68 (1965), for the proposition that an appellate court, reviewing an agency's cease and desist order, would consider "only whether the FTC order is supported by the evidence and a reasonable legal theory." 596 F.2d at 1387. But the petitioners in *Atlantic Refining* apparently had challenged *only* the final cease and desist order. Thus, the case does not discuss the standard of review a court should apply upon a challenge to other stages of an agency proceeding. If one may generalize at all from the case, it suggests that the standard of review is determined by the amount of discretion the agency had in making the decision under review.

remand.[3] *See Dolcin Corp.* v. *FTC*, 219 F.2d 742, 750-52 (D.C. Cir.), *cert. denied*, 348 U.S. 981 (1955).

In sum, the majority's approach to finality effectively sets the *Mathews* v. *Eldridge* standard to a nullity. It suggests that the expense of defending oneself in an administrative proceeding is "irreparable injury." Yet this expense appears in every administrative case. And, by the majority's reasoning, every challenge to an administrative complaint would be lost if the respondent's challenge were delayed until the administrative proceeding had run its course. Thus, *every* respondent in *every* administrative case could claim that, unless he obtained interlocutory review of the complaint, "crucial collateral claims [would] be lost and potentially irreparable injuries [would] be suffered." Nor is there any language in the opinion to suggest that a respondent must make a high threshold showing of apparent unfairness and abuse before he is entitled to this review. In our view, this result is clearly inconsistent both with the governing case law and with sound policy.

---

[3] "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper." 15 U.S.C. § 45(c).

Prosecutorial Discretion

The *Standard Oil* opinion directs the district court to probe an executive decision to prosecute an apparent violator. The opinion indicates that certain of the Commission's possible motivations are suspect, in that they take too great an account of congressional expressions of interest. But, prosecutorial agencies have wide discretion in determining whether, and when, to institute proceedings. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Oyler* v. *Boles*, 368 U.S. 448, 456, (1962); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413-14 (1958); *Kixmiller* v. *Securities & Exchange Commission*, 492 F.2d 641 (D.C. Cir. 1974); *but see Medical Committee for Human Rights* v. *Securities & Exchange Commission*, 432 F.2d 659 (D.C. Cir. 1970), *dismissed as moot*, 401 U.S. 973 (1971).

Judicial review of the decision to prosecute is narrowly circumscribed. To defend successfully on the basis of abuse of prosecutorial discretion, "one must prove that the selection was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972). Furthermore, the abuse must be obvious from the proferred evidence. *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250-51 (1967). Successful challenges, such as that in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886), have been characterized by striking disparities between those prosecuted and those not. No substantial indication of

an "arbitrary classification" or the like appears here. Thus, the extensive inquiry proposed by the court, and which we discuss below, would represent serious and unprecedented interference with the authority of administrative agencies to carry forward their enforcement activities.

Scope of Judicial Inquiry

The *Standard Oil* opinion sets very indefinite, if not actually contradictory, boundaries for the district court's review, and implies that the lower court is to probe the minds of the Commissioners. In providing guidance to the district court, the majority opinion states:

> "If the district court finds as a fact that the FTC made the 'reason to believe' determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure *or* with complete absence of a 'reason to believe' determination, then the FTC has not complied with the Act." 596 F.2d at 1386 (emphasis added).

Use of the disjunctive in the second sentence suggests that, even if the Commission made a formal determination that there was a reasonable basis for instituting the action, the district court should still make a separate inquiry into whether the complaint was issued solely *because* of outside pressure. In

other words, the district court may inquire into the Commissioners' reasons for issuing the complaint.

It seems to us quite likely that this type of judicial inquiry would prove inappropriately intrusive. For example, the district court might conclude that it should ask what evidence was before the Commission at the time it made its decision. If the agency produces some such evidence, but a small amount, the court might well proceed to adjudicate whether that evidence was so insufficient as to warrant the conclusion that the complaint was issued "solely" in response to congressional pressures. Several other aspects of the opinion, detailed in the margin, heighten our concern that the court's review might extend to matters such as these.[4] Such broad judicial review,

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[4] Other aspects of the opinion that point up the prospect of inappropriately broad judicial intervention inherent in the panel majority's approach include:

1. As the FTC's brief on appeal pointed out, the administrative complaint stated on its face that the Commission had found "reason to believe" that Standard Oil had violated the antitrust laws. The Ninth Circuit's persistence in the face of this assertion might be read as suggesting that the district court should go beyond examining formal indicia of a "reason to believe" determination.

2. The opinion recites the chronology of facts leading to the issuance of the FTC's complaint. It emphasizes the short time that elapsed between the Commission's July 11 statement to Senator Jackson (indicating that the Commission had not determined what, if any, further action it should take) and the Commission's

however, is inconsistent with the intent of the FTC Act, which commits these matters to agency discretion,[5] with the Administrative Procedure Act, which exempts from court review matters committed by law to agency discretion,[6] and with the continued effectiveness of administrative law enforcement generally. Further, such probing into the Commissioners' men-

---

issuance of the Standard Oil complaint seven days later. This portion of the opinion might be read as questioning whether seven days is enough time for the Commissioners properly to weigh the staff's input and make a determination.

3. The opinion emphasizes the FTC's failure to submit a list of witnesses when requested by the ALJ, suggesting that the district court should be impressed by the number of facts—or the lack of them—that the FTC had on hand when it made its decision to issue a complaint.

[5] *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662 (1926); *Montgomery Ward* v. *Federal Trade Commission*, 379 F.2d 666, 672 (7th Cir. 1967) (determination under Section 5 of FTC Act that proceeding would be in the public interest is a matter committed to agency discretion).

[6] 5 U.S.C. § 701(a)(2):

This chapter applies, according to the provisions thereof, except to the extent that—

* * * * *

(2) agency action is committed to agency discretion by law.

See also *Action on Safety and Health* v. *Federal Trade Commission*, 498 F.2d 757, 760-62 (D.C. Cir. 1974).

tal processes is precisely the sort of inquiry forbidden by *United States* v. *Morgan*, 313 U.S. 409 (1941).[7]

In sum, the *Standard Oil* decision threatens to upset the proper balance between individual rights and effective law enforcement efforts by all administrative agencies. Under the present system of administrative law and judicial review, enforcement programs are not subject to premature and disabling judicial intervention, except in circumstances where

---

[7] In *Morgan*, the Secretary of Agriculture, acting pursuant to statutory authority, had established maximum prices for trading in the Kansas City Stockyards. Upon review, the lower court authorized the entities challenging the maximum pricing scheme to take the Secretary's deposition. He was questioned at length regarding the process by which he reached his conclusions, including the manner and extent of his study of the record and his consultations with subordinates. The Supreme Court condemned this excursion in strong terms:

> "But the short of the business is that the Secretary should never have been subjected to this examination. 'The proceeding before the Secretary has a quality resembling that of a judicial proceeding.' *Morgan* v. *United States*, 298 U.S. 468, 480. * * * We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary' 304 U.S. 1, 18." 313 U.S. at 442.

In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971), the Court held that, despite *Morgan*, examination of administrative officials is proper in certain limited circumstances. But, in *Overton Park*, the Court was presented with a clear and objective set of factors which the administrator should have considered in making his decision. *Overton Park* thus has no application to the present case, where the "reason to believe" decision is committed entirely to the agency's discretion.

respondents would otherwise suffer irreparable injury. The Ninth Circuit's opinion, however, would greatly increase the interruptions in administrative processes and tip the balance unreasonably toward delay. Federal agencies conduct hundreds of administrative proceedings every year. These agencies cannot function effectively if a substantial number of these proceedings are to be interrupted for premature review, or if Commissioners are constantly required to articulate for the courts the mental impressions that went into formulating their decisions to prosecute.

We trust you share our concern over this unfortunate opinion, and we hope you will give prompt and favorable consideration to the FTC's request. Please feel free to make whatever use of this letter you deem appropriate.

Sincerely,

/s/ Ralph C. Ferrara
RALPH C. FERRARA
General Counsel
Security and Exchange Commission

/s/ Andrew S. Krulwich
ANDREW S. KRULWICH
General Counsel
Consumer Product Safety Commission

/s/ Robert R. Bruce
ROBERT R. BRUCE
General Counsel
Federal Communications Commission

/s/ Brien Kehoe
BRIEN KEHOE
General Counsel
Federal Maritime Commission

/s/ Norton J. Come
NORTON J. COME
Acting General Counsel
National Labor Relations Board

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Supreme Court, U.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, ET AL.,
Petitioners

—*v.*—

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1979
CERTIORARI GRANTED FEBRUARY 25, 1980

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* The order of the district court dismissing the complaint and the order of the court of appeals denying the petition for rehearing are reproduced at Pet. App. 1a-2a, and 23a-24a, respectively.

DOCKET ENTRIES

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFFS

—*v.*—

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, Chairman, PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS

DATE	PROCEEDINGS
1975	
May 1	Filed complt . . . iss summs Filed pltf's 1st Req for Prod., inspect & copying of docs
May 20	Filed summs on ret exec as to U.S.A. unexec as to other defts
Jul 3	Filed deft's Memo of Pts & Auths in Supp of Mo to Dism Filed deft's Resp to First Req of pltf for Prod, Inspection, & Copying of Docs
Jul 9	Filed Letterrescheduling hrg date of 7-25-75 to 9-12-75/11:00 am
Aug 15	Filed Brief of Pltf in Supp of ITS Req for Prod of Docs and In Ans to Defts' Resp Thereto Filed Brief of Pltf in Opp to Defts' Mo to Dism and in Supp of its Complt
Sep. 2	Filed Stip and Ord that hrg on defts' Mo to Dism be cont to 9-26-75
Sep 11	Filed defts' Reply Memo of Pts & Auths in Supp of defts' Mo to Dism
Sep 26	ORD: deft's mo to dism GRANTED: deft to prepare Ord—LHB
Oct 3	Filed ORDER: complaint & action are DISMISSED w/out costs—LHB

DATE	PROCEEDINGS

1975

Nov 26 Plaintiff's NOTICE OF APPEAL from Order of 10-3-75

Dec 1 mailed notice to counsel & 9th CCA

Dec 8 Designation of Record on Appeal
Order for Reporter's Transcripts by appellant

Dec 9 Record designated by appellee

Dec 16 Stipulation correcting reporter's transcript.

Dec 18 Reporter's Transcript of 9-26-75 in an original & 1 copy

Dec 19 Mailed record to 9th CCA

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

Clerk, U.S. District Court
Northern District of California

By /s/ Carol [Illegible]
Deputy Clerk

Dated Dec. 19, 1975

PILLSBURY, MADISON & SUTRO
TURNER H. MCBAINE
WALLACE L. KAAPCKE
GEORGE A. SEARS
RICHARD W. ODGERS
225 Bush Street
San Francisco, California 94104
Telephone: (415) 983-1000
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 75 0860 LHB

[Filed May 1, 2:33 PM, 1975]

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFFS

vs.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; MARY ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF

STANDARD OIL COMPANY OF CALIFORNIA (SOCAL) states the following claims for declaratory relief against the *FEDERAL TRADE COMMISSION* and its chairman and members (the Commission or FTC):

JURISDICTION AND VENUE

1. This is a civil action for declaratory relief arising under the Fifth Amendment to the Constitution of the United States, section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), the Declaratory Judgment Act (28 U.S.C. §§ 2201, et seq.) and the Administrative Procedure Act (5 U.S.C. §§ 551, et seq.). The matter in controversy exceeds the sum of $10,000, exclusive of

interest and costs. The Court has jurisdiction of this proceeding under sections 1331, 1337, 1346, 1361 and 2201 of Title 28 of the United States Code, and section 704 of Title 5 of the United States Code.

SOCAL contends that the Commission issued a complaint against it in FTC Docket No. 8934 under congressional pressure without reason to believe that SOCAL had committed a violation of section 5 of the Federal Trade Commission Act; that, in so doing, the Commission denied SOCAL due process of law and violated statutory obligations imposed upon the Commission by section 5 of the Federal Trade Commission Act and section 10(e) of the Administrative Procedure Act; that SOCAL has exhausted its administrative remedy; that SOCAL has no judicial remedy other than this proceeding to protect its substantial rights and secure a declaration that the Commission must adhere to the requirements of law in issuing a complaint; that relief herein is essential to prevent the imposition of heavy and improper expense and burdens on SOCAL, and the prospective misuse of millions of dollars of Federal funds in prosecution by the FTC of an action not lawfully initiated.

2. This proceeding is properly brought in this Court under provisions of section 1391 of Title 28 of the United States Code.

THE PARTIES

3. Plaintiff SOCAL is a corporation organized and existing under the laws of the State of Delaware with its principal headquarters at 225 Bush Street, San Francisco, California.

4. The Federal Trade Commission is an agency of the United States organized and existing pursuant to the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq.) with its principal office in Washington, D.C. Defendant Engman is Chairman and defendants Dixon, Thompson, Hanford and Nye are members of the Federal Trade Commission.

FIRST CLAIM FOR RELIEF: DENIAL OF DUE PROCESS OF LAW

5. On July 18, 1973, the FTC issued a complaint in Docket No. 8934 (copy attached hereto as Exhibit A), naming SOCAL together with Exxon Corporation, Texaco, Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company (Indiana), Shell Oil Corporation and Atlantic Richfield Company as respondents, and charging them under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), with alleged combination or agreement to monopolize the refining of crude oil into petroleum products in the relevant market (compl., par. 20), and subsidiarily with alleged maintenance of monopoly power over and alleged restraint of trade and maintenance of a noncompetitive market structure in the refining of crude oil (compl., pars. 21, 22).

The complaint issued without a proposed order specifying what relief the Commission sought. FTC complaint counsel and others of the FTC staff have asserted that the FTC seeks a drastic "restructuring" of the petroleum industry, including a divestiture of refinery and pipeline facilities of respondents worth hundreds of millions of dollars, at a time in history when the adequacy and continuity of supplies of gasoline, heating oil and other petroleum products are matters of great national concern.

6. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. § 45) declares that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful. Section 5(b) of the Federal Trade Commission Act authorizes the issuance of a complaint by the Commission subject to compliance with these statutory requirements:

> "Whenever *the Commission shall have reason to believe* that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve

upon such person, partnership, or corporation a complaint stating its charges in that respect * * *" (emphasis added).

7. The FTC has been granted broad investigatory powers to enable it to satisfy the jurisdictional requirement of "reason to believe" imposed upon it by section 5 of the Federal Trade Commission Act, including the power to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (15 U.S.C. § 49).

8. Section 5 of the Federal Trade Commission Act incorporates the reason-to-believe requirement in order to ensure that the heavy burdens suffered by a respondent as a result of institution of a complaint proceeding will not be thrust upon it unless there exists a substantial and demonstrable basis for reasonable belief by the Commission that a violation of section 5 of the Federal Trade Commission Act may have occurred.

9. On January 2, 1974, SOCAL filed a motion in the FTC proceeding asking, among other relief, that the FTC complaint be withdrawn or dismissed without prejudice on the ground that a pending investigation of the petroleum industry had been prematurely terminated by the FTC under congressional pressure, and that the complaint had been issued by the Commission without compliance with the reason-to-believe requirement of section 5 of the Federal Trade Commission Act and in violation of SOCAL's right to due process of law under the Fifth Amendment to the Constitution of the United States.

10. On February 1, 1974, the Administrative Law Judge certified the said motion of SOCAL to the Commission for decision. On February 12, 1974, the FTC denied the certified motion. On February 20, 1974, SOCAL applied for reconsideration on the ground, inter alia, that the Commission had denied the motion prior to receipt of SOCAL's supporting memorandum.

11. SOCAL's application for relief was based upon the following circumstances, among others:

(a) On December 21, 1971, the FTC issued a resolution stating its intention to institute an investigation of

firms in the petroleum industry to determine whether such firms were engaged in unfair methods of competition or unfair acts or practices in violation of section 5 of the Federal Trade Commission Act (Docket No. 721-0047). For 17 months thereafter the FTC made no effort directly to investigate the acts and practices of SOCAL, either through examination of its officers and employees, or by review of its documents, books and records.

(b) On May 31, 1973, 17 months after the FTC issued its resolution, but before any direct investigation of SOCAL, the Honorable Henry M. Jackson, as Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, sent a letter to defendant Lewis A. Engman, Chairman of the Federal Trade Commission, making this request:

> "I am hereby requesting the Federal Trade Commission to prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products."

(c) One day later, on June 1, 1973, the FTC issued subpoenas in Docket No. 721-0047, directing the attendance of three officers of the SOCAL organization to testify on June 26, 28 and 29, 1973. The testimony of these three officers constitutes the only direct investigation of SOCAL the FTC conducted pursuant to its December 1971 resolution in Docket No. 721-0047.

(d) On June 27, 1973, before the FTC had furnished to Senator Jackson the report requested by him, before the three subpoenaed SOCAL officers had testified, and before there had been any examination of SOCAL documents, books and records, The Evening Star and The Washington Daily News published an article with the headline "8 Oil Firms Face FTC Action" (copy attached hereto as Exhibit B). The article, based upon "congressional sources," stated in part:

"The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed.

"The commission, after more than a year of investigating oil industry practices it feels may have contributed to the shortage, has drawn up a plan which will recommend divestiture of key oil functions in order to make the industry more competitive.

"FTC staffers, who have been studying oil and gas shortages at the request of Congress, will present their study and a proposed antitrust case to the full commission on July 1.

"At the same time, they will make their findings available to Sen. Henry Jackson, D-Wash., who has pressured the FTC to make public its findings on the oil and gas crisis."

(e) On July 6, 1974, less than 10 days later, the FTC issued a subpoena duces tecum directing SOCAL to produce certain corporate books and records. On the same day, July 6, 1974, and without having made any examination of any SOCAL documents, or of its officers or employees except as noted above, Chairman Engman transmitted to Senator Jackson an undated report entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." In his letter of transmittal to Senator Jackson (copy attached hereto as Exhibit C), Chairman Engman said:

"*This report has not been evaluated or approved by the Commission,* and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission.

"While the Commission recognizes its obligation to honor your Committee's request for information, I must emphasize that the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity which could jeopardize any future law enforcement action by the Commission in this area" (emphasis added).

(f) Senator Jackson responded by letter dated July 9, 1973, that the Preliminary FTC Staff Report would be published as a congressional committee print unless Chairman Engman furnished by July 13, 1973, "specific reasons why the release of this report would jeopardize future legal action by the Commission."

(g) On July 11, 1973, Chairman Engman replied (copy attached hereto as Exhibit D), stating that the Preliminary Staff Report was "an internal staff memorandum prepared in the context of a currently pending investigation," and that

> "The Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with *its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation*" (emphasis added).

thereby clearly implying that the Commission had not yet made its determination as to what, if any, action should be taken on the basis of the staff report.

(h) On July 13, 1973, Senator Jackson released the Preliminary FTC Staff Report for publication as a committee print. The Report as published by the Senate Committee on Interior and Insular Affairs states that it was "Prepared at the Request of" Senator Jackson.

(i) Under date of the second business day thereafter, July 17, 1973, the Commission issued a News Release stating that

> "The Federal Trade Commission today issued a complaint against the nation's eight largest petroleum companies, alleging that they have combined or agreed to monopolize refining, maintained monopoly power over refining, and maintained a noncompetitive market structure in refining, in the Eastern and Gulf coast states and in parts of the mid-continent area."

This News Release was issued only 11 days after Chairman Engman's statement to Senator Jackson (on July 6, 1973), that the Preliminary Staff Report "has not been evaluated or approved by the Commission," and only 6 days after his statement to Senator Jackson (on July 11, 1973) that the Commission had not yet taken action on the Report, and had a duty to proceed judiciously and responsibly in doing so.

(j) On July 18, 1973, the complaint was issued under the official seal of the Secretary of the Commission bearing that date.

(k) In an article on March 16, 1975 (copy attached hereto as Exhibit E), the New York Times stated that the charge "that the F.T.C. case was politically inspired * * * finds some support in the events of early summer 1973" after the winter shortage of heating oil and the spring shortage of gasoline:

> "Senator Henry M. Jackson, Democrat of Washington, then and now a Presidential aspirant, publicly prodded the trade commission to say when it would report the results of its investigation of the structure of the oil industry.
>
> *"Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great political pressure to file a complaint. It did so on July 17, 1973"* (emphasis added).

12. Events after issuance of the complaint confirm that the FTC acted in violation of the statutory requirement of section 5 of the Federal Trade Commission Act in issuing the complaint. Among the circumstances which so demonstrate are the following:

(a) The issuance of the FTC complaint aroused the immediate concern of Federal agencies and officials charged with responsibility for oil supply and energy problems. On August 27, 1973, the Office of the Energy Advisor of the Department of the Treasury sent to the Deputy Secretary of the Treasury and to the President's Oil Policy Committee an analysis of the FTC complaint and of the Preliminary FTC Staff Report. The Office of

the Energy Advisor included the following among its conclusions (copy attached hereto as Exhibit F):

> "The FTC report's implication that the current shortages of petroleum are deliberately contrived by the major oil firms is incorrect. The companies have merely been responding to Government laws and policies, and these laws and policies have been the real culprits. The solution, therefore, is not divestiture, but rather a change in laws and policy.
>
> "The Federal Trade Commission should reconsider its action and withdraw the complaint issued against the eight largest oil companies."

(b) Senator Jackson asked the Commission to make available to his congressional subcommittee the evidence which was claimed to support issuance of the complaint. On August 30, 1973, the Commission responded that it would furnish to the subcommittee "[a]ll evidence obtained by the Commission as a result of its investigation which led to issuance of the complaint on July 18, 1973, *In the matter of Exxon, et al.*, Docket No. 8934, and which evidence now comprises the investigational files underlying the adjudication of this matter." On January 23, 1974, in a statement made at the conclusion of energy crisis hearings before the Permanent Subcommittee on Investigations (copy attached hereto as Exhibit G), Senator Jackson stated that "these hearings have not turned up any hard evidence that the major oil companies deliberately created the crisis—either in parallel or in concert."

(c) In the meantime, in the FTC proceedings, the Administrative Law Judge issued on November 23, 1973 an order which, among other things, required FTC complaint counsel to file lists of witnesses and documents. FTC complaint counsel did not comply but instead filed on December 7, 1973 "comments" asserting that such requirements were "inappropriate," and submitted a proposal for a program of first, second and third "waves" of discovery by FTC complaint counsel. The "first wave" of such discovery program was to consist of depositions of controllers of the respondent oil companies to determine the nature and location of their corporate records.

(The FTC's investigative subpoena duces tecum to obtain SOCAL books and records in Docket No. 721-0047 was quashed on July 27, 1973, by reason of commencement of the adjudicative proceeding in Docket No. 8934; SOCAL has not been required to produce any documents, books or records in Docket No. 721-0047 or Docket No. 8934.) The proposed discovery program of FTC complaint counsel in Docket No. 8934 was and is a patent effort to renew the incomplete, insufficient and prematurely terminated FTC investigation of the petroleum industry.

On December 10, 1973, the Administrative Law Judge issued an order granting FTC complaint counsel an extension of time, and on February 7, 1974, the Administrative Law Judge issued an order requiring FTC complaint counsel to furnish their lists of witnesses and documents by April 8, 1974.

On April 8, 1974, FTC complaint counsel filed their purported lists of witnesses and documents. FTC complaint counsel listed as witnesses five economists on the FTC staff. Complaint counsel did not list any witness whose testimony was taken or who was interviewed in the investigation which, according to the Commission, "led to issuance of the complaint on July 18, 1973." Complaint counsel did not list a single document obtained during that investigation.

(d) On April 18, 1974, respondents moved for a preclusion order to limit FTC complaint counsel to use of the witnesses and documents thus listed. In their opposition filed May 7, 1974, FTC complaint counsel made the following admissions, all of which are inconsistent with existence of genuine basis for reason to believe the complaint should issue as required by section 5 of the Federal Trade Commission Act: (1) that they "had no intention whatever regarding specific evidence to be used at trial"; (2) that, after "review [of] all material in [their] possession," complaint counsel "still do not have a single witness that [they] intend to call at trial"; and (3) that "the great majority of documents which we expect to offer at trial are not in our possession but will be obtained through our forthcoming discovery." The

Administrative Law Judge denied the preclusion motion on June 20, 1974, after the Commission denied reconsideration of SOCAL's motion for dismissal or withdrawal of the complaint on June 4, 1974.

13. In its order of June 4, 1974 refusing to dismiss the complaint for noncompliance with the reason to believe requirement of section 5 of the Federal Trade Commission Act (copy attached hereto as Exhibit H), the Commission asserted:

> "And it has long been settled that *adequacy of the Commission's 'reason to believe' a violation of law has occurred* and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the commissioners and *will not be reviewed by the courts.* Once the commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (emphasis added).

That order of the Commission, and the subsequent refusal of the Commission to withdraw or dismiss the complaint without prejudice as thereafter suggested by the Administrative Law Judge, give rise to the controversy for which relief is sought in this Court.

14. On October 18, 1974, FTC complaint counsel filed a motion for "major integrated procedural relief," asking the Commission to adopt, for purposes of the said proceeding, various of the discovery rules of the Federal Rules of Civil Procedure in place of the Commission's rules applicable in the proceeding; to adopt the Manual for Complex Litigation in Federal courts as a guide for conduct of the proceeding; and to appoint a second administrative law judge to rule upon discovery matters in the proceeding.

Complaint counsel asserted that while "hundreds of depositions will undoubtedly be necessary" and "the witnesses and deponents in this case may run into the thou-

sands" and "complaint counsel's discovery alone is anticipated to encompass literally millions of documents," the problem was that "[t]*he Rules of Practice of the Federal Trade Commission have crippled this proceeding*" (FTC complaint counsel mem. in support of motion, Oct. 18, 1974, pp. 2, 6, 49, emphasis added). The New York Times stated on March 16, 1975 (Exhibit E hereto) that "pursuit of a precomplaint investigation, including taking sworn testimony in so-called investigative hearings, would have given the staff greater freedom of discovery than the rules permit once a complaint is issued."

Complaint counsel concluded their said motion with the declaration that "[t]he *Exxon* case goes to the very fabric of American industry, exploring heretofore untouched areas vital to the national interest" (mem., p. 67), and requested that the motion be certified to the Commission on an expedited basis.

SOCAL agrees that the complaint does indeed attack operations "vital to the national interest," and avers that there is extraordinary reason for judicial review of the purported basis for issuance of the complaint as against SOCAL.

15. On October 23, 1974, the Administrative Law Judge certified the said motion to the Commission without recommendation, although Rule 3.22(a) of the FTC Rules of Practice and Procedure specifies that he shall certify "with his recommendation" any motion upon which he lacks authority to rule. The Administrative Law Judge stated:

> "The continuation, within the existing adjudicative framework, of the 'discovery' proposed by complaint counsel poses serious problems that require resolution. *In view of these circumstances, the Commission may want to consider, as an alternative, the withdrawal of this case from adjudication—that is, dismissal without prejudice—so that it may be more fully investigated without the restrictions imposed by the existing rules governing adjudicative proceedings.* This would avoid or minimize many of the problems about which complaint counsel are concerned. Because this is a determination resting

within the administrative discretion of the Commission, the administrative law judge expresses no opinion as to which course of action is preferable" (emphasis added).

On March 4, 1975, the Commission declined to adopt the suggestion of the Administrative Law Judge to withdraw or dismiss the complaint in the proceeding, and it denied complaint counsel's motion in all respects.

The refusal of the Commission to withdraw or dismiss the complaint left SOCAL without further avenue of relief from the Commission on the lack of basis for issuance of the complaint as against SOCAL.

16. There is an actual controversy between SOCAL and the FTC. SOCAL contends that (a) the FTC does not have unbridled power to institute proceedings—it is not and cannot be the law that, as the Commission asserts, "adequacy of the Commission's 'reason to believe' a violation of law has occurred * * * will not be reviewed by the courts"; (b) under section 5 of the Federal Trade Commission Act a complaint cannot issue as a matter of statutory requirement unless the Commission has reason to believe that a violation of section 5 has occurred; (c) the Commission cannot have such reason to believe unless it is in possession of facts reasonably warranting such relief; (d) it is the duty of the Commission under said statutory requirement to ascertain and to consider the relevant facts; (e) as demonstrated by the administrative record, at the time it authorized the issuance of the complaint the Commission did not possess facts sufficient to warrant a reasonable belief that SOCAL may be violating section 5 of the Federal Trade Commission Act; (f) as demonstrated by the administrative record, the Commission did not exercise the required discretion and reasonably consider the facts in issuing the complaint as to SOCAL; (g) in issuing the complaint the Commission improperly considered congressional pressures and political and economic factors extraneous to any alleged violation of section 5 of the Federal Trade Commission Act; and (h) in the circumstances, issuance of the complaint in Docket No. 8934 was not lawful and proper as to SOCAL.

17. By reason of the foregoing, the FTC has arbitrarily, unlawfully and capriciously issued the complaint in Docket No. 8934, has abused the discretion vested in it by section 5 of the Federal Trade Commission Act, has violated obligations imposed on it by section 10(e) of the Administrative Procedure Act, has denied SOCAL the due process of law guaranteed to it by the Fifth Amendment to the Constitution of the United States, and therefore the complaint must be withdrawn or dismissed by the Commission.

18. SOCAL has exhausted its administrative remedy before the Commission. The Commission's order of June 4, 1974, denying dismissal of the complaint for noncompliance with the reason to believe requirement was clear and its effect on SOCAL is immediate and concrete, and the same is true of the Commission's order of March 4, 1975, refusing to withdraw the complaint as the Administrative Law Judge suggested. The case would impose costs in the millions of dollars upon the FTC and the taxpayers who provide the funds for its operations. The case would impose massive expenses upon SOCAL (and other respondents), together with incalculable burdens related to interruption of normal business operations when oil supplies are of national concern.

No effective review of the Commission's said orders would be available on ultimate review in a court of appeals of an order to cease and desist entered in the proceeding after many years and at great cost. SOCAL has no judicial remedy to secure review of the important administrative law issue at hand except this proceeding for declaratory relief in this Court.

SECOND CLAIM FOR RELIEF: VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

19. Plaintiff incorporates by reference paragraphs 1 through 18 of the complaint.

20. By issuing the complaint in Docket No. 8934 without reason to believe that a violation of the Federal Trade Commission Act had occurred, the FTC failed to

comply with the statutory requirements of section 5(b) of the said Act (15 U.S.C. § 45).

THIRD CLAIM FOR RELIEF: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

21. Plaintiff incorporates by reference paragraphs 1 through 20 of the complaint.

22. By reason of the acts and omissions set forth in preceding paragraphs, the Commission issued the complaint in Docket No. 8934 in violation of the statutory requirements of section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706), which specifies that agency action which is arbitrary, capricious or an abuse of discretion, or which is in excess of statutory authority, or which is without observance of procedure required by law, is unlawful and must be set aside.

Wherefore, plaintiffs pray that this Court enter a judgment:

(1) declaring that issuance of the complaint in Docket No. 8934 denied SOCAL due process of law in violation of obligations imposed upon the FTC by the Fifth Amendment to the Constitution of the United States;

(2) declaring that issuance of the complaint in Docket No. 8934 was in violation of requirements imposed upon the FTC by section 5 of the Federal Trade Commission Act;

(3) declaring that issuance of the complaint in Docket No. 8934 was in violation of requirements imposed upon the FTC by the Administrative Procedure Act;

(4) declaring that the said complaint must be withdrawn or dismissed by the Commission; and

(5) providing such other and further relief as may be just and proper.

Dated: May 1, 1975.

PILLSBURY, MADISON & SUTRO
TURNER H. MCBAINE
WALLACE L. KAAPCKE
GEORGE A. SEARS
RICHARD W. ODGERS

By /s/ George A. Sears
Attorneys for Plaintiff
225 Bush Street
San Francisco, California 94104

EXHIBIT A

UNITED STATES OF AMERICA

BEFORE
FEDERAL TRADE COMMISSION

Docket No. 8934

IN THE MATTER OF:
EXXON CORPORATION, ET AL.

COMPLAINT

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8934

IN THE MATTER OF
EXXON CORPORATION, a corporation;
TEXACO, INC., a corporation;
GULF OIL CORPORATION, a corporation;
MOBIL OIL CORPORATION, a corporation;
STANDARD OIL COMPANY OF CALIFORNIA, a corporation;
STANDARD OIL COMPANY (INDIANA), a corporation;
SHELL OIL CORPORATION, a corporation; and
ATLANTIC RICHFIELD COMPANY, a corporation

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Com-

mission Act (15 U.S.C., Section 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. *Respondents*

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York 10020. Exxon is the nation's largest corporation with assets in 1972 exceeding $21.5 billion. In 1972 its sales exceeded $20 billion—second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd Street, New York, New York 10017. Texaco is the nation's third largest corporation with assets in 1972 exceeding $12 billion. In 1972 its sales exceeded $8.6 billion—eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania 15230. Gulf is the nation's sixth largest corporation with assets in 1972 exceeding $9.3 billion. In 1972, its sales exceeded $6.2 billion—eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd Street, New York, New York 10017. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding $9.2 billion. In 1972 its sales exceeded $9.1 billion—seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware

with its principal office and place of business at the Standard Oil Building, 225 Bush Street, San Francisco, California 94104. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding $8 billion. In 1972 its sales exceeded $5.8 billion—twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Avenue, Chicago, Illinois 60605. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding $6.1 billion. In 1972 its sales exceeded $4.5 billion—fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas 77002. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding $5.1 billion. In 1972 its sales exceeded $4 billion—seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Avenue, New York, New York 10020. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding $4.6 billion. In 1972 its sales exceeded $3.3 billion—twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. *The Industry*

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. *Relevant Markets*

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. *Jurisdiction*

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various states to locations in various other states of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. *Acts and Practices*

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a non-competitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid non-competitive market structure, respondents, individually and with each other, have been and are engaged in, among others the following acts and practices, some of which, *inter alia*, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing;

(e) Pursuing a common course of action of accommodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artifically high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accommodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

18. Respondents, individually and with each other, have followed and do follow common courses of action in accommodating the needs and goals of each other throughout the petroleum industry thereby increasing the interdependence of respondents and reducing respondents' incentive to behave competitively.

VI. *Effects*

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VI. *Violations*

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining

of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 18th day of July, 1973, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the —— day of ———— A.D. 19—, at ———— o'clock is hereby fixed as the time and ———————————— as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and

together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by the respondents and to restore competition in the relevant market or markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be served by its Secretary and its official seal to be hereto fixed at Washington, D.C. this 18th day of July 1973.

By the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

[SEAL]

EXHIBIT B

THE EVENING STAR

and

THE WASHINGTON DAILY NEWS

Washington, D.C., Wednesday, June 27, 1973—104 Pages

8 OIL FIRMS FACE FTC ACTION

By BAILEY MORRIS

STAR-NEWS WRITER

The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed.

The commission, after more than a year of investigating oil industry practices it feels may have contributed to the shortage, has drawn up a plan which will recommend divestiture of key oil firm functions in order to make the industry more competitive.

FTC staffers, who have been studying oil and gas shortages at the request of Congress, will present their study and a proposed antitrust case to the full commission on July 1.

At the same time, they will make their findings available to Sen. Henry Jackson, D-Wash., who has pressured the FTC to make public its findings on the oil and gas crisis.

THE CASE, Hill sources say, will be a ground-breaking monopoly case as controversial as the one the FTC has issued against the major cereal companies recommending they be broken up in order to reduce prices to consumers and make the industry more competitive.

Companies named in the FTC complaint include: Exxon, Texaco, Gulf Oil, Mobile Oil, Standard Oil of California, Standard Oil of Indiana, Shell Oil and Atlantic Richfield.

The staff-approved antitrust case, being worked out by more than 20 people must be approved by the full commission, sources close to the investigation explained.

Unlike many other FTC antitrust cases, this case is fully backed by the findings contained in the independent study of oil shortages conducted by the FTC's Bureau of Economics the sources said.

HOW STRONG an order the FTC will issue against the oil companies has not yet been determined but it is known that in the past the FTC has considered taking the politically sensitive action of separating the crude oil functions from the retailing and wholesaling functions of the companies.

This would, in effect, spin off control of gasoline stations across the country to a separate company or companies free of constraints imposed by the oil giants.

The FTC has already issued individual complaints against Standard Oil of Ohio (Sohio) and Phillips Petroleum Company.

They are charged in the FTC complaints with placing illegal constraints on their dealers and interfering in neighborhood gas price wars.

THE CASE against Sohio charges the company with fixing the retail price of gasoline in certain areas of the country with the agreement of local retail station owners.

EXHIBIT C

FEDERAL TRADE COMMISSION,
Washington, D.C., July 6, 1973.

Hon. HENRY M. JACKSON,
Chairman, Interior and Insular Affairs Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As Chairman of the Senate Interior and Insular Affairs Committee and the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, you have requested a report on the relationship between the structure of the petroleum and related industries and the current shortage of petroleum products.

In response to that request, I am enclosing a copy of a preliminary staff report to the Commission prepared at my direction. This report is based upon the comprehensive investigation of the petroleum industry which the staff began in late 1971. This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission.

While the Commission recognizes its obligation to honor your Committee's request for information, I must emphasize that the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity which could jeopardize any future law enforcement action by the Commission in this area.

Sincerely yours,

LEWIS A. ENGMAN, *Chairman.*

EXHIBIT D

FEDERAL TRADE COMMISSION,
Washington, D.C., July 11, 1973.

Hon. HENRY M. JACKSON,
Chairman, Senate Permanent Subcommittee on Investigations,
Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of July 9, 1973, concerning a Commission staff report on the relationship between the structure of the petroleum and related industries and the current shortage of petroleum products, a copy of which we provided you at your request on July 6.

In my letter accompanying that report, I emphasized that "the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity ,which could jeopardize any future law enforcement action by the Commission in this area." You ask the Commission to justify this statement, and to identify the specific portions of the report which we feel should not be made public.

The answer to your question lies in the basic role of the Commission as a law enforcement agency charged by Congress with the responsibility for insuring compliance with the antitrust laws, and the fact that the staff report in question is an internal staff memorandum prepared in the context of a currently pending investigation. The Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation.

The Commission has always taken the position, therefore, that, as a matter of policy, every effort should be made to prevent unnecessary public disclosure of staff conclusions and recommendations pertaining to matters involving potential Commission law enforcement action.

Please let me know if I can be of further assistance.

Sincerely,

LEWIS A. ENGMAN.

EXHIBIT E

F.T.C. HONING ANTITRUST AXES

By EDWARD COWAN

WASHINGTON—The Federal Trade Commission has decided to propose changes in its rules of practice that could strengthen its ability to bring major antitrust cases such as *Exxon Et Al.*, the pending complaint against eight big oil companies.

If adopted, the new rules, expected to be announced within a few days, would make it much easier for the commission's staff to take depositions from corporate officials in the pretrial "discovery" proceedings that are crucial to the development of a case.

Difficulties and delays with discovery in the Exxon case have caused acute frustration within the commission's Bureau of Competition and have generated some talk that the case may never come to trial.

The new rules, it is hoped, would give fresh momentum to the Exxon effort, which is considered the most ambitious attempt at reorganizing the oil industry since the old Standard Oil Company was split into 34 different units in 1911.

Stephen Nye, a San Francisco antitrust lawyer who joined the commission in June, 1974, said last week in response to an inquiry that the commission had voted 5-to-0 last Tuesday to propose rules "to bring commission adjudicative practice into line with the Federal court practice in discovery proceedings."

Mr. Nye said that in addition to helping with development of antitrust cases the proposed rules "would help in a bait-and-switch carpet case" in which the agency challenges advertising as false or misleading.

An avalanche of corporate comment on the rule proposals is expected, most of it unfavorable. Nevertheless,

Mr. Nye said he hoped the measures would go into effect by midyear.

In the Exxon case, the commission's Bureau of Competition is seeking what economists call "vertical divestiture." At present, the companies involved are integrated. They own oil wells. They own, sometimes, jointly, pipelines that carry the crude to refineries. They own refineries. They own wholesale and resale distribution operations.

They are, in addition to the Exxon Corporation, the Atlantic Richfield Company, the Gulf Oil Corporation, the Mobil Oil Corporation, the Shell Oil Company, the Standard Oil Company of California, the Standard Oil Company of Indiana and Texaco, Inc.

The F.T.C. staff would like to bring about substantial separation in ownership of production, pipelines and refining. A major purpose is to strengthen competition in refining by making it easier for so-called independent refiners to get crude oil for processing into gasoline and other petroleum products.

A complaint alleging that the very structure and habitual practices of the industry, such as swapping oil between companies, were violations of Section 5 of the Federal Trade Commission Act, was filed in July, 1973.

Since then, the case has dragged on at what the staff has regarded as an unbearably slow pace, with F.T.C. lawyers battling oil company lawyers before an administrative law judge over the taking of depositions and other discovery matters.

Last Oct. 18 the staff formally asked the commission to substitute for its own rules of practice, in this case only, the Federal Rules of Civil Procedure.

In a March 6 order, a unanimous commission refused. "As a general principle, the commission does not favor tailoring special rules for individual cases," it said.

The order added that proposed changes in the agency's discovery rules would be published soon, and that the eight oil companies, like anyone else, would be free to comment on them.

If the rules are what the staff hopes, and if they are adopted, the Exxon case could take another eight or 10

years to complete. The staff figures it needs three years to prepare for trial before an administrative law judge—taking depositions from oil company employes, evaluating their testimony, drawing subpoenas for documents, studying those documents and taking another round of depositions.

The trial itself might take a year, it is estimated. The judge would need at least four months, possibly eight,

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It is about to propose new rules that will make it easier to get the data it needs to prosecute.

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to write a decision. The companies would almost certainly appeal a negative ruling to the five-member commission. The commission's final order, including a remedy, if a violation is found, could be challenged in the Federal courts, up to the Supreme Court level.

The tone of the Oct. 18 staff motion for simpler discovery procedures, including such terminology as first, second and third "waves" of discovery, conveys the sense of a protracted war against a deeply entrenched enemy.

For their part, the companies have said that the practices and organization complained of actually mean lower prices to consumers. To split up the companies, they have said, would raise prices.

Privately, the companies have said that the F.T.C. case was politically inspired. The charge, while hardly a new form of business defense, finds some support in the events of early summer 1973. The country had experienced a heating-oil shortage in the winter of 1972-73. By spring, gasoline supplies were tight and pump prices rising.

Senator Henry M. Jackson, Democrat of Washington, then and now a Presidential aspirant, publicly prodded the trade commission to say when it would report the results of its investigation of the structure of the oil industry.

Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great political pressure to file a complaint. It did so on July 17, 1973.

Ironically, pursuit of a pre-complaint investigation, including taking sworn testimony in so-called investigative hearings, would have given the staff greater freedom of discovery than the rules permit once a complaint is issued.

Twenty months later, the staff has taken only a handful of depositions. The first subpoenas for documents, directed to the American Petroleum Institute, are returnable tomorrow, and evidently will not be contested.

Congress last year appropriated an extra $1-million for the F.T.C. to be used in compiling a computerized index of the case. In all, the agency estimates that it is spending $2-3 million this year on energy industry work, including $1.6-million for *Exxon Et Al.*

Yet, the staff has been somewhat demoralized by the difficulty of discovery under the present rules.

"Our hands are tied," says a lawyer.

The problem, he explains, is that before it can issue properly drawn subpoenas, the staff must find out how a company keeps its data and files.

If a subpoena for documents is drawn too loosely, it was explained, there are two dangers: the company may drown the staff in millions of pieces of paper, or the administrative law judge may quash the subpoena as being too broad.

The present rules require the staff to show that a particular deposition is "necessary" and that the information cannot be had voluntarily. This is too time consuming, the staff argues, and threatens the very life of a case.

So far, the 20-month struggle between the agency and the industry has centered around procedures, chiefly discovery, not the merits of the complaint.

However, the F.T.C. staff has looked deeply into the complex economics of the oil industry—the oil sharing and exchange arrangements, processing arrangements, joint ownership of pipelines, joint bidding for leases, intense marketing competition followed by retrenchment,

the shift of "profit centers" from production to marketing, the role of depletion, the many types of crudes and the ability of most refineries to process some and not others, and on and on.

From a seemingly infinite number of facts and arguments, commissioners and courts are supposed to decide whether the present structure and practices of the industry are procompetitive or anticompetitive.

It is a formidable task, one that has caused some professional students of antitrust laws to wonder whether the Exxon case is basically nonlitigable.

"It may be that this is really a case for Congress," one lawyer said, "They can make a decision in two weeks."

If not two weeks, perhaps two years. In any event, there are pending in Congress bills that would do what the F.T.C. staff seeks to do—break up the big oil companies.

EXHIBIT F

83rd Congress
1st Session

COMMITTEE PRINT

DEPARTMENT OF THE TREASURY STAFF ANALYSIS

OF THE

PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY, JULY 2, 1973

PRINTED AT THE REQUEST OF

HENRY M. JACKSON, Chairman

COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS
UNITED STATES SENATE

PURSUANT TO

S. Res. 45

A NATIONAL FUELS AND ENERGY
POLICY STUDY

Serial No. 93-18 (92-53)

[EMBLEM]

Printed for the use of the
Committee on Interior and Insular Affairs

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1973

LETTER OF TRANSMITTAL

DEPARTMENT OF THE TREASURY,
Washington, D.C., August 29, 1973.

Hon. HENRY M. JACKSON,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: On July 12, 1973, you released to the public the Federal Trade Commission's report on its investigation of the petroleum industry. My staff recently completed an analysis of the FTC report and a copy of the analysis is enclosed for your information. You will note that our analysis differs considerably from the FTC's.

Sincerely,

WILLIAM E. SIMON,
Deputy Secretary of the Treasury,
(Chairman, Oil Policy Committee).

STAFF ANALYSIS

of

OFFICE OF ENERGY ADVISOR
DEPARTMENT OF THE TREASURY

For Submission to:

DEPUTY SECRETARY OF THE TREASURY

(Chairman, Oil Policy Committee)

on

The Federal Trade Commission's July 2, 1973

"PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY"

by:

Douglas L. McCullough
Senior Staff Advisor
Date: August 27, 1973

PURPOSE

The purpose of this analysis is to analyze the Federal Trade Commission's July 2, 1973 report of its investigation of the petroleum industry and to consider the practical implications of divestiture of oil refining or producing operations from marketing. Specifically, this analysis will probe what effect divestiture would have on the industry's future investment and the overall effect on the supply of oil.

CONCLUSIONS

1. Many of the facts in the FTC report are inaccurate. Consequently, the resulting conclusions are questionable.

2. Although perhaps unintentional, the FTC report is biased against the largest integrated oil companies. Nothing in the report supports restricting the FTC's complaint to the eight largest oil companies. Why not seven, or ten, or all of the fully integrated oil companies?

3. As a result of this bias, the FTC's final conclusions are incorrect or misleading at best, regarding: (a) the charge that the majors control the output of the independent crude producers; (b) the charge that the majors have engaged in exclusionary practices in their use of exchanges; (c) and the conclusion that the independent sector's welfare is dependent on the well-being of independent refiners.

4. Although there is little question that the continued existence and viability of the independent refiner is important to maintain a healthy petroleum industry, divestiture of refining or producing capability from the large majors is not the best way to protect the independent refiner. Integration of the producing, refining, transporting, and marketing of crude oil and petroleum products has proven to be an efficient method of operation. To meet the demands of 1985, the equivalent of about 60 new refineries averaging a throughput capacity of about 160,000 barrels per day must be constructed. The total investment required by these refineries could be as much as $15 million. A primary requisite for a company (major or independent) considering such an investment is the assurance of a source of crude. Divestiture would work against that assurance.

5. Divestiture would cause the integrated oil companies to consider foreign investments and/or operations as their best course of future action, thus further aggravating U.S. shortages and balance of trade problems.

6. The FTC's complaint against the eight largest integrated oil companies, if successful, would cause con-

siderable adverse impact on future domestic energy supplies.

7. The FTC report's implication that the current shortages of petroleum are deliberately contrived by the major oil firms is incorrect. The companies have merely been responding to Government laws and policies, and these laws and policies have been the real culprits. The solution, therefore, is not divestiture, but rather a change in laws and policy.

8. The Federal Trade Commission should reconsider its action and withdraw the complaint issued against the eight largest oil companies.

EXHIBIT G

BUSINESS POLICIES

STATEMENT BY CHAIRMAN HENRY JACKSON (D-WASH) OF SENATE PERMANENT INVESTIGATIONS SUBCOMMITTEE, JANUARY 23, 1974, AT CONCLUSION OF THREE DAYS OF HEARINGS ON ENERGY CRISIS

(TEXT)

Today concludes three days of hearings directed at finding out whether the United States is truly suffering from a fuel shortage and if so, why. Most Americans seem to believe that the shortage has been contrived by the oil industry in order to raise prices, reduce competition and force a retreat in environmental standards.

The Permanent Investigations Subcommittee has called top officials of the seven largest oil companies to tell their story and, if possible, to refute the widespread suspicions and allegations about the industry's behavior in the current crisis. Unfortunately, we still do not have all the facts.

We do know, however, that the prices of crude oil, gasoline, heating oils and other petroleum fuels have risen by leaps and bounds in the last few months.

We do know that thousands of service stations—branded and unbranded—have closed, and that thousands of others are open only sporadically.

We do know that motorists must waste fuel going from one station to another looking for gasoline, and must at times line up for hours to get less than a full tank. We know that gasoline has become totally unavailable in some parts of the country.

We do know that thousands of workers have been laid off and that whole industries are in distress for lack of fuel.

Despite these signs of shortage, we have determined through this hearing and the questionnaires prepared by

the Subcommittee, that the seven companies stocks of crude oil and refined products were as high or higher at year-end in 1973 as they were one year earlier.

We also know, from the materials submitted to the Subcommittee by the companies themselves, that the nation's distress is extremely profitable to the oil industry. We have learned from their own submissions that the earnings of the seven largest firms increased 46 percent between the first three quarters of 1972 and the first three quarters of 1973, on a sales volume that increased only 6 percent. If we can believe the trade press and the simplest principles of economics, oil industry profits have grown even more spectacularly *since* the third quarter of 1973.

On the other hand, these hearings have not turned up any hard evidence that the major oil companies deliberately created the crisis—either in parallel or in concert. It is clear that they benefit financially from the shortage, but I have found no reason to believe that the companies set about knowingly to create it.

We still do not have the facts to lay these suspicions entirely to rest, however. I believe that the one point that this hearing has brought home clearly is our lack of timely, reliable, complete and credible information about the energy industries.

The Federal Government and the American people do not have adequate information on our domestic energy resources and reserves. We do not have reliable current data on primary crude oil and product stocks, and there is no usable information at all on secondary stocks. Import statistics are covered with confusion and doubt.

The wholesale price statistics of the Federal Government regarding gasoline and fuel oil are not believable or usable, and the companies cannot or will not provide such data.

We know almost nothing about the international pricing and investment policies of the companies. And we do not have even approximate figures on the tax subsidies of the oil industry, much less on the benefits the nation receives in return for these special privileges.

This is information the Congress needs in order to legislate—regarding taxes, regarding leasing of energy resources on the public lands, regarding price regulation and antitrust policy, regarding imports and international investment policy, regarding research and development for alternative energy sources, and regarding measures to cope with the current emergency.

This is information the Executive Branch needs regularly and promptly to discharge its responsibilities, and which the American people need to dispel the cloud of suspicion and resentment that surrounds the present crisis.

Among other things—

—We don't know whether the Federal Government's allocation program is reducing hardships or aggravating them.

—We don't know how high gasoline will go at the pump.

—We don't know if rationing will be necessary.

—We don't know the number of capped wells and what they could contribute to alleviate the shortage.

—We don't know how many independent operators have been driven out of business during this crisis and why.

—We intend to obtain the answers to these questions and the numerous others which will be posed after a detailed examination of the transcript of these hearings and the company's submissions.

This is only the first round in the search for the truth. Some of the information we desire shows the need for a new agency in the Federal Government with a capability for sophisticated data processing and analysis, as would be established by the Energy Information Act that Senator Nelson and I have introduced. Other information this Subcommittee received will be used for legislative purposes over the coming weeks.

Today I will ask the companies represented here to furnish the Committee with complete information on their import prices and costs, and on the prices they

carry on their books for crude oil—imported and domestic—which they or their affiliates produce and run in their own refineries.

The companies will be asked to disclose to the Committee, and to the American people, the total value to them, and cost to the Treasury, of the special tax preferences they receive under federal tax laws and IRS regulations.

I will also ask for specific data and documents which provide justification for the cost pass throughs which are permitted by the Federal Energy Office.

EXHIBIT H

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen A. Nye

Docket No. 8934

IN THE MATTER OF
EXXON CORPORATION, a corporation, ET AL.

ORDER DENYING RECONSIDERATION

By order dated February 1, 1974, the Administrative Law Judge properly certified to the Commission certain oral and written motions to dismiss the complaint in this matter on the grounds that (1) the Commission lacked reason to believe respondents had violated the law at the time it issued the complaint and (2) the proceeding is not in the public interest. The Commission denied these motions by order of February 12, 1974, and respondents now urge reconsideration on those same grounds and, in addition, on an alleged denial of due process and the fact that complaint counsel are pursuing additional post-complaint investigation. Complaint counsel urge the Commission to grant the request for reconsideration and clarify its policy in the area of post-complaint investigations.

Respondents' argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications

received by this agency from any member of Congress is even remotely of the character deemed improper by the courts. *Pillsbury* v. *FTC*, 354 F.2d 952 (5th Cir. 1966); *D.C. Federation of Civic Associations* v. *Volpe*, 459 F.2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter.

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is entirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, e.g., definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts.

The Commission finds no grounds here for reconsidering its prior denial of respondents' motions to dismiss the complaint in this matter. Accordingly,

IT IS ORDERED that respondents' motions for reconsideration be, and they hereby are, denied.

By the Commission. Commissioner Nye did not participate.

[SEAL]

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: June 4, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-75-0860-LHB

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFF

v.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; STEPHEN A. NYE, Member, DEFENDANTS

MOTION TO DISMISS

Defendants, the Federal Trade Commission and its individual Commissioners, by and through their undersigned attorneys, move this Honorable Court to dismiss the complaint and action herein, on Friday, July 25, 1975 at 11:00 a.m., in Courtroom No. 6, 17th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California.

The grounds for this motion are that the Court lacks jurisdiction over the subject matter (Rule 12(b)(1), FRCivP); and that plaintiff has failed to state a claim upon which relief can be granted (Rule 12(b)(6), FR Civ).

Dated: July 3, 1975

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Stephen A. Shefler
STEPHEN A. SHEFLER
Assistant United States Attorney
Civil Division

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before: HONORABLE LLOYD H. BURKE, Judge

C 75-0860 LHB

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFF

—*vs*—

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; STEPHEN A. NYE, Member, DEFENDANTS

REPORTER'S TRANSCRIPT

Friday, September 26, 1975

Defendants' Motion to Dismiss

[60] THE COURT: Well, I think that under some circumstances the District Court can entertain a complaint of the type which is presented in this action.

I think the circumstances under which such jurisdiction would apply would normally be unusual at least.

The allegations here are no more than a reference, substantial language, to political pressures which were applied to members of the Commission. The accuracy of that conclusion may or may not be debatable. I don't intend to make any such attempt.

I am inclined to be under the view there was kind of more than casual influence, political or otherwise, applied in connection with the Commission decision in this case. The fact that such influence was applied does not necessarily mean that it was improper. I think the function of the legislators, state and federal, is at least in part to make their views known to administrative agencies and those who are responsible for the mechanics of government.

Here, I don't believe that the complaint suggests anything which brings the action within the scope of either Jewel or Volpe.

I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under most unusual circumstances, would be productive of nothing more than chaos.

[61] Under the circumstances, I don't believe that this court should exercise any power such as may exist, to the extent that it may exist. The complaint doesn't warrant it.

Motion is granted.

Will you submit the order, Counsel.

* * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 75-3678

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES

May 18, 1979

Appeal from the United States District Court for the Northern District of California.

Before ELY, CARTER and TANG, Circuit Judges.

TANG, Circuit Judge.

Standard Oil Company of California (SOCAL) appeals from a judgment dismissing an action in which SOCAL sought review of certain aspects of the Federal Trade Commission's (FTC) decision to issue an administrative complaint under § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975). The issue raised is to what extent the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), allow the district court to review the FTC's stated determination that it has "reason to believe" that SOCAL is engaged in monopolistic practices in violation of law. Under 15 U.S.C. § 45(b), this "reason to believe" determination is a prerequisite to the issuance of an FTC complaint.[1] We conclude here that

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[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975), provides as relevant:

> Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

what constitutes "reason to believe" is unreviewable because the "reason to believe" determination is committed to the FTC's discretion. However, we also conclude that the issue whether the FTC did or did not in fact make a "reason to believe" determination is reviewable.

FACTS

Because SOCAL's complaint was dismissed for failure to state a claim upon which relief can be granted, the following facts alleged in SOCAL's complaint must be accepted as true. *East Oakland-Fruitvale Planning Council* v. *Rumsford*, 471 F.2d 524, 527 (9th Cir. 1972).

In December 1971, the FTC issued a resolution stating its intention to investigate whether the petroleum industry was engaged in unfair trade practices. Seventeen months passed and the FTC made no apparent effort to investigate SOCAL either through examination of its officers or employees or through review of corporate records. Then, on May 31, 1973, Senator Henry M. Jackson, Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigation Subcommittee of the Senate Committee on Government Operations, sent a letter to FTC Chairman, Lewis A. Engman, requesting that, within 30 days, the FTC provide a report on the relation between the petroleum and related industries and the current and prospective shortages of petroleum products. One day after the letter was sent, the FTC issued subpoenas to three SOCAL officers and shortly thereafter on July 6, 1973, the FTC issued SOCAL a subpoena duces tecum to produce certain corporate books and records.

On July 6, 1973, the FTC also responded to Senator Jackson's request for a report by transmitting to him an undated document entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." Chairman Engman's letter accompanying the report stated: "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission."

On July 13, Senator Jackson released the preliminary FTC report for publication as a committee print. In the week following, the FTC issued complaint number 8934 charging SOCAL and seven other oil companies with various antitrust violations. However, just two days prior to Senator Jackson's release of the report for publication, Chairman Engman had warned that publication of the report would be "inconsistent with [the FTC's] duty to proceed judiciously and responsibly" in determining what, if any, further action should be taken by the FTC.

Prior to the filing of its district court complaint, SOCAL sought relief in the administrative proceeding. In January 1974, SOCAL filed a motion in the FTC proceeding for dismissal of the complaint without prejudice. It argued that Congressional pressure alone had led to the premature termination of the FTC investigation and that the FTC had issued the complaint without "reason to believe" SOCAL had committed a violation. In February, after an administrative law judge certified SOCAL's motion to the FTC, the motion was denied. Later the FTC refused SOCAL's motion for reconsideration.

This action was filed in May 1975. SOCAL prayed that the district court compel the FTC to withdraw or dismiss the administrative complaint. SOCAL claimed that the FTC had arbitrarily and capriciously issued the complaint without facts sufficient to warrant a reasonable belief that SOCAL had violated the law. SOCAL also claimed that, in deciding to issue the complaint, the FTC had improperly considered Congressional pressure and legally irrelevant political and economic factors.

SOCAL also pleaded other facts to support its claim that the agency lacked "reason to believe" SOCAL had violated the Act. For example, counsel for the FTC was unable to provide a satisfactory list of witnesses or documents as ordered by the administrative law judge. Apparently, the FTC did not have even one proposed witness to be called in the proceeding. Also, in light of the FTC's discovery problems, the administrative law judge had recommended in October 1974 that the FTC

withdraw the complaint pending further investigation. The FTC rejected this suggestion.

In sum, SOCAL claimed that the FTC had abused its power to issue complaints under 15 U.S.C. § 45(b). The district court, however, dismissed SOCAL's action on grounds that it did not have authority to inquire into what constituted "reason to believe" under 15 U.S.C. § 45(b).

DISCUSSION

SOCAL argues that it is entitled to relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The FTC is an agency subject to the APA. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Moreover, as SOCAL pleaded, the district court had jurisdiction under 28 U.S.C. § 1331. *See Califano* v. *Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

Nevertheless, the FTC claims that the issuance of the Administrative complaint is not within the purview of the APA because it is not "agency action" under 5 U.S.C. §§ 551(13) and 702.[2] We disagree. The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Consequently, the APA's generous review provisions are given a hospitable interpretation. *Id.* at 140-41, 87 S.Ct. 1507. There is also a presumption of judicial review under the APA unless there

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[2] The cited statutes provide as relevant:

> "[A]gency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 551(13).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702.

is clear and convincing evidence that Congress intended to foreclose review of a final agency action either by a specific statute or by committing action to agency discretion. *See, e.g., Morris* v. *Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed. 2d 377 (1975); *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 140, 87 S.Ct. 1507; *Washington* v. *United States Environmental Protection Agency*, 573 F.2d 583, 587 (9th Cir. 1978); *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F.2d 1165, 1168 (9th Cir. 1975). Therefore, the relevant question is not whether the FTC's issuance of complaint number 8934 is "agency action" as to SOCAL—for almost any act an agency takes can be "agency action"—but whether, under the APA, it is reviewable agency action. The latter inquiry triggers the following questions: first, whether a statute precludes judicial review, 5 U.S.C. § 701(a)(I); second, whether agency action is committed to agency discretion by law, 5 U.S.C. § 701(a)(2); and third, whether there is final agency action for which there is no adequate judicial remedy other than review under the APA.[3]

There is no statute precluding judicial review of the FTC's determination that there is "reason to believe" the charged party has violated the law. Therefore, inquiry proceeds to whether the "reason to believe" determination lies entirely within the FTC's discretion. 5 U.S.C. § 701(a)(2). The APA's exception for actions committed to agency discretion applies "in those rare instances

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[3] The cited statutes provide as relevant:

> This chapter [5 U.S.C. §§ 701-706] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). When no law fetters the exercise of discretion, the courts have no standard by which to measure the lawfulness of agency action, and consequently, the action is not susceptible to judicial review. *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Under this standard, a determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA. In *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926), this Court stated that a determination that an FTC complaint would be in the public interest, like the determination that there is "reason to believe" the law has been violated, lies within the FTC's discretion. Later case law upholds the validity of this early statement. Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. *See, Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co., supra*, 338 U.S. at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term "unfair" is the power to determine whether there is "reason to believe" that a party is engaged in "unfair" conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

However, the facts alleged in SOCAL's complaint do not allow inquiry to end with our conclusion that the determination of what constitutes "reason to believe" is committed to the FTC's discretion. The rule of *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, provides

that judicial review is foreclosed when there is no law to apply in a "given case." Accordingly, a complaint in a given case must be examined to see whether it raises claims for which there is law to apply. *Strickland* v. *Morton*, 519 F.2d 467, 471 (9th Cir. 1975). In this respect, the courts will review an agency action when the alleged abuse of discretion is the violation of "constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975). *See also City of Santa Clara* v. *Andrus*, *supra*, 572 F.2d at 666. Such issues must be reviewed "though other aspects of the agency action may be committed to the agency's expertise and discretion." *East Oakland-Fruitvale Planning Council* v. *Rumsford*, *supra*, 471 F.2d at 533.

Under the above standard, there is a reviewable issue in this case. A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a "reason to believe" determination that the law has been violated. *See Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides "law to apply" in this case because SOCAL claims that the FTC disregarded the restriction and acted outside the term of the statute. SOCAL claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of SOCAL and under the pressure of outside influences. In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made.

The allegations in SOCAL's complaint and the reasonable inferences from the allegations support SOCAL's claim. As alleged, no investigation of SOCAL occurred for 17 months after the FTC had resolved to investigate the petroleum industry. Then, immediately after the reception of Senator Jackson's request, the FTC took the testimony of three SOCAL officers. Shortly thereafter,

the FTC subpoenaed SOCAL records. But at the same time the subpoena issued, the FTC sent Congress a report which, as FTC Chairman Engman expressly stated, had not been evaluated or approved by the FTC. Chairman Engman also stated that publication of the report would be inconsistent with the FTC's duty to proceed judiciously and responsibly. Nonetheless, within a few days of publication, complaint number 8934 issued naming SOCAL as a respondent. All the above described events occurred in the brief period May 30 to July 18, 1973. Moreover, after administrative proceedings on the complaint had commenced, the FTC ran into severe discovery difficulties. This led the administrative law judge to suggest that the FTC might wish to consider dismissing the complaint so that a fuller investigation could take place.

Considering the alleged timing and circumstances, SOCAL's allegations are sufficient to raise the claim that the FTC either acted without deliberation as to SOCAL or felt itself goaded into action by outside influences. Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), SOCAL's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes "reason to believe" but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a "reason to believe" determination at all.

If the district court finds as a fact that the FTC made the "reason to believe" determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure or with complete absence of a "reason to believe" determination, then the FTC has not complied with the Act.

We must further determine whether there has been a "final agency action" as to SOCAL for which there is no adequate judicial remedy other than review under the APA. The finality element in 5 U.S.C. § 704 should be interpreted in a "pragmatic" way. *Abbott Laboratories*

v. *Gardner, supra,* 387 U.S. at 149, 87 S.Ct. 1507. If possible, statutory finality requirements in general should not be construed so as "to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 901, 47 L.Ed. 18 (1976). In this case, SOCAL has exhausted administrative remedies by raising its claim before the FTC. SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable. Moreover, assuming that a court of appeals could properly entertain SOCAL's present claims upon review of a cease and desist order under 15 U.S.C. § 45(c), it is unlikely that the record of the completed administrative proceedings would be sufficient to determine the claims for the simple reason that the FTC has already rejected them on legal grounds and thus foreclosed SOCAL from developing relevant facts. Furthermore, an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and, therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint. 15 U.S.C. § 45(c); *Atlantic Refining Co.* v. *Federal Trade Commission, supra,* 381 U.S. at 367-68, S.Ct. 1498. We therefore find that the issuance of the FTC complaint number 8934 was a "final agency action" as to SOCAL.

CONCLUSION

The judgment of the district court is vacated and the case is remanded for proceedings consistent with this opinion.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

(1) I concur in that portion of Judge Tang's opinion holding that a determination by the Federal Trade Commission (hereafter "FTC") that there is "reason to be-

lieve" a violation of law has occurred, is within the agency's discretion and not reviewable in the district court under the Administrative Procedure Act (hereafter "APA"). (2) I dissent from the holding that there is reviewable by the court the question as to whether the FTC did or did not make a "reason to believe" determination. (3) I also dissent from the holding that FTC's action was "final action" and thus reviewable.

The Remand to Determine if the FTC Made a Determination

The opinion should have ended after point (1) above. In my opinion the discussion of the additional points (2) and (3) above referred to is foreclosed by what the majority decided as to the first point. If the "reason to believe" decision is not reviewable, then it seems wrong to me to decide whether the FTC did or did not make a "reason to believe" determination is reviewable. Had the first point been decided otherwise, namely, that the determination as to "reason to believe" a violation had occurred was reviewable, then, of course, it would follow there could be reviewed also the question as to whether or not the FTC did actually make a "reason to believe" determination. But since the majority held that the "reason to believe" decision was not reviewable but rested in agency discretion, it seems wrong to me to hold, as the majority does, as to the second point.

The government's brief demonstrates the rule that action by the FTC in starting a proceeding is agency action committed to agency discretion. The law is based upon the general theory of prosecutorial discretion and the APA exception for agency discretion. Thus judicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories, Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S.App. D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's deci-

sion is against prosecution (*e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmiller* v. *SEC*, 160 U.S.App.D.C. 375, 379, 492 F.2d 641, 645 (1974)).

In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

In *Hills-Bros.* v. *FTC, supra*, this circuit held that notwithstanding the "reason to believe" standard in the FTC Act, the discretion of the FTC to issue complaints was no different from other generally nonreviewable prosecutorial determinations. It held it was not necessary for the FTC to list its specific grounds for its "reason to believe."

Although the APA was enacted in 1946, the provision for exceptions from judicial review "agency action . . . committed to agency discretion by law" was a restatement of existing law. See "Administrative Procedure Act, Legislative History," S.Doc. 248, 79th Congress, 2d Session, 229-30 (1946). Thus the principles set forth in *Hills Bros.* in 1926 were reaffirmed by Congress when it enacted the APA in 1946.

Finally, judicial review of whether FTC made a determination of "reason to believe," etc., would require courts to probe the mental processes of the Commissioners, a procedure disapproved in *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

The decision in the case at hand as to the second point, allowing review to determine if the FTC actually made a determination of "reason to believe," would open a can of worms and lead to various appeals of preliminary acts and orders. The decision is incorrect and inconsistent with the prior holding that the "reason to believe" decision is action committed to agency discretion and not reviewable by this court.

With the slight opening for review provided by the second point of this decision, I foresee that there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function.

I would hold that since determination of the "reason to believe" issue was committed to agency discretion and exempted from judicial review under 5 U.S.C. § 701(a)(2), and since nothing in plaintiff's district court complaint creates any genuine issue as to the regularity of the Commission's complaint, judicial review of the Commission's decision to issue the complaint is unwarranted and improper.

Final Agency Action Under 5 U.S.C. § 704

The majority also holds that the action of the FTC was final agency action under 5 U.S.C. § 704 (point (3), *supra*). I disagree. The review of the Commission's proceedings should await the final action of the Commission.

In *Gifford-Hill & Co.* v. *FTC*, 173 U.S. App. D.C. 135, 137, 523 F.2d 730, 732 (1975), the court held that a "decision [by the FTC] to institute an adjudicatory proceeding is not an 'agency action'—and most certainly not a 'final agency action'—made reviewable by the [Administrative Procedure Act]." *See also Miles Laboratories* v. *FTC*, 78 U.S. App.D.C. 326, 328, 140 F.2d 683, 685, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 88 L.Ed. 1582 (1944).

In *Chamber of Commerce* v. *FTC*, 280 F. 45 (8 Cir. 1922) the FTC filed a complaint alleging that the Commission had reason to believe that petitioners were engaging in unfair competition. The petitioners sought judicial review of the issuance of the complaint. The court of appeals held that "neither the District Court nor this court has power under the act [FTC] to interfere with the investigation and inquiry of the Commission" (*id.*, p. 48), and dismissed the action. The court's holding was specifically approved by the Supreme Court in *Petroleum Exploration, Inc.* v. *Public Service Comm'n*,

304 U.S. 209, 222, n. 21, 58 S.Ct. 834, 82 L.Ed. 1294 (1938) and i *Federal Power Comm'n* v. *Edison Company*, 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

Plaintiff contends that the issue of the administrative complaint should be treated as "final" under 5 U.S.C. § 704 and that exhaustion of administrative remedies should not be required, because, in the absence of judicial review at the preliminary stage, the validity of the issuance of the administrative complaint cannot later be reviewed or becomes moot. Plaintiff contends that if the complaint is ultimately dismissed by the Commission, there would be nothing to review; that if the proceedings ultimately result in a cease and desist order, a review is limited to the validity of that order and does not extend to the propriety of the issuance of the underlying complaint, citing *Hills Bros.* v. *FTC*, *supra* (9 F.2d at 484). Thus plaintiff argues that the issuance of the administrative complaint should be deemed "final" for review purposes because, otherwise, there would be "no adequate remedy in a court" for a review of the matter.

The contention is without merit. The issuance of the complaint is a preliminary agency determination and not "final" in any effective sense. Plaintiff's argument is based on a misconception of the purpose and meaning of the "no other remedy" provision in 5 U.S.C. § 704. That provision or condition was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt "final agency action" from judicial review under the APA if there is an adequate alternative legal remedy. *See, e.g., Warner* v. *Cox*, 487 F.2d 1301, 1304 (5 Cir. 1974). *See generally Richfield Oil Corporation* v. *United States*, 207 F.2d 864, 869, 870 (9 Cir. 7953).

Plaintiff's remedy, which is an adequate one, is to test the validity of the final effective agency action. The cease and desist order is subject to judicial review and the findings of the Commission must be supported by substantial evidence.

Plaintiff is seeking an exception to the rule requiring exhaustion of administrative remedies. APA's limitation of judicial review to cases involving "final agency action" is a codification of the "exhaustion" rule. The rule is justified by "very practical notions of judicial efficiency . . . ." *McKart* v. *United States*, 395 U.S. 185, 194, 195, 89 S.Ct. 1657, 1663, 23 L.Ed. 2d 194 (1969).

Legal expenses in pursuing defenses to administration action (or remedies) is not a sufficient reason to avoid the exhaustion requirement. *Petroleum Exploration Inc., supra* (304 U.S. 209, 222, 58 S.Ct. 963, 82 L.Ed. 1408).

> "To permit judicial review . . . of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays . . . and would render orderly administrative proceedings impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies." *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 69 App.D.C. 338, 339, 101 F.2d 426, 432 (1938).

Exceptions to the exhaustion doctrine apply only in "very unusual and limited circumstances," *Lone Star Cement Corp.* v. *FTC*, 339 F.2d 505, 510 (9 Cir. 1964); and require, for one thing, a showing of substantial prejudice, *i.e.*, "irreparable injury." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *McKart* v. *United States, supra* (395 U.S. at 197, 89 S.Ct. 1657) (incarceration). No irreparable injury to plaintiff is shown in this case.

The decision should be limited to the first point referred to above. I would affirm on that basis alone.

SUPREME COURT OF THE UNITED STATES

No. 79-900

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF AMERICA

ORDER ALLOWING CERTIORARI

Filed February 25, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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Supreme Court, U.S.
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In the Supreme Court

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United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

Brief of Respondent In Opposition to Petition for a Writ of Certiorari

GEORGE A. SEARS
RICHARD W. ODGERS
C. DOUGLAS FLOYD
225 Bush Street
Mailing Address: P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Attorneys for Respondent

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address: P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

VS.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

Brief of Respondent In Opposition to Petition for a Writ of Certiorari

PRELIMINARY STATEMENT

The petition seeks review of a Ninth Circuit order that reverses the dismissal of a complaint on the face of the pleading and remands the case for further proceedings in the district court. The case is governed by long-settled legal principles embodied in the Administrative Procedure Act, and there is no reason for the Court to depart from its regular practice of abstaining from review of such interlocutory orders.[1]

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[1]E.g., *Firemen* v. *Bangor & A. R. Co.* (1967) 389 U.S. 327, 328; *Hamilton Shoe Co.* v. *Wolf Brothers* (1916) 240 U.S. 251, 257-258; *Amer. Const. Co.* v. *Jacksonville Railway* (1893) 148 U.S. 372, 384.

The Ninth Circuit decision is based on allegations of a flagrant failure by the Federal Trade Commission to adhere to an explicit limitation on its authority to issue complaints embodied in its organic act. The complaint of Standard Oil Company of California (Socal) alleges—with support in detailed factual allegations (infra, pp. 5-7)—that the Commission did not exercise its discretion and make a good faith determination of reason to believe that Socal had violated the Federal Trade Commission Act, and that the Commission issued its complaint in Docket No. 8934 because of extraneous political considerations entirely unrelated to the merits of any reason to believe that Socal had violated the law.

The Ninth Circuit *accepted* the position, which the Commission argues in the petition, that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA" (Pet., Appx. B, p. 10a). The question for which review is ostensibly sought is not presented by the interlocutory order in the instant case.

Nor is there any basis for the Commission's speculation that the decision below "threatens serious disruption to the administrative process" (Pet., p. 9).[2] Under the allegations of Socal's complaint, which stand admitted on motion to dismiss, the Ninth Circuit decision is plainly correct under settled principles of review of agency action em-

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[2]Several other agency counsel also disagree with the decision but recognize that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Pet., Appx. F, p. 33a).

bodied in the judicial review provisions of section 706 of the Administrative Procedure Act.

THE QUESTION PRESENTED

Where the statute creating the Federal Trade Commission authorizes the Commission to issue a complaint only when it makes a determination that there is reason to believe that the Federal Trade Commission Act has been violated, does a complaint for declaratory relief filed in district court by a respondent in a Commission proceeding, alleging (a) that the Commission in issuing its complaint made no determination that it had reason to believe that the respondent had violated the law and (b) that the Commission improperly based its action on extraneous political considerations, state a claim on which relief can be granted?

STATEMENT OF THE CASE

This is a pleading case. It is settled that complaints are to be liberally construed and that a complaint may not be dismissed if it states a claim for relief under any set of facts that might be proved under its allegations (*Conley* v. *Gibson* (1957) 355 U.S. 41, 47-48; 2A Moore, Federal Practice, pp. 2266-2274).

Section 5 of the Federal Trade Commission Act provides that "[w]henever the Commission shall have reason to believe" that a violation of the Act has been or is occurring, and it appears to the Commission that a proceeding would be in the public interest, "it shall issue * * * a complaint stating its charges * * *" (15 U.S.C. § 45(b)). The Ninth Circuit stated:

"A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a 'reason to believe' determination that the law has been violated. See *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission,* 286 F.2d 803, 806 (9th Cir.), *cert. denied,* 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides 'law to apply' in this case because Socal claims that the FTC disregarded the restriction and acted outside the terms of the statute. Socal claims the FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of Socal and under the pressure of outside influences. In short, Socal claims that the FTC did not make and, in the circumstances, could not have made the 'reason to believe' determination despite a recitation on the face of the FTC complaint that the determination had been made.

"The allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim. * * *

"* * * Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), Socal's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (Pet., Appx. B, pp. 12a-13a).

The Ninth Circuit observed (Pet., Appx. B, pp. 12a-13a) that Socal's claims are supported by detailed factual allegations. These include the following:

1. In December 1971, the Commission instituted an investigation (Docket No. 721-0047) to determine whether oil companies were engaging in unfair acts or practices in violation of section 5. During the next 17 months, the Commission did not examine any of Socal's officers or employees or any of its documents, books and records.

2. On May 31, 1973, Senator Jackson, as Chairman of the Interior and Insular Affairs Committee of the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, and then a presidential candidate, sent a letter to Chairman Engman asking the Commission to

> "prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products."[3]

The next day, June 1, the Commission issued subpoenas to three officials of Socal, who testified at investigatory hearings on June 26, 28 and 29.[4] And on July 6 the Commission issued a subpoena duces tecum directing Socal to produce documents, but the investigation in Docket No. 721-0047 was summarily closed before any response by Socal was due.

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[3]It is impossible to prepare a considered report dealing with such vast and complex subject matters in a 30-day period. The "current shortages" were the first peacetime shortages of fuel oil and gasoline in the nation's history.

[4]On June 27, 1973, The Evening Star and The Washington Daily News published an article with the heading "8 Oil Firms Face FTC Action." The article, based on "congressional sources," not FTC sources, stated in part "The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed."

3. Also on July 6, 1973, with no examination by the Commission staff of any Socal documents or any of its officials except for the three questioned several days before, Chairman Engman sent Senator Jackson a report captioned "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," stating:

> "This report has not been evaluated or approved by the Commission, and the findings and conclusions in the report do not necessarily reflect the views of the Commission."

On July 9, Senator Jackson threatened to publish the Preliminary Staff Report as a congressional committee print. On July 11, Chairman Engman objected to such publication, stating that

> "[t]he Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation"

thereby making clear that the Commission had not made a determination as to what, if any, action the Commission should take. On July 13, Senator Jackson released the Preliminary Staff Report for publication as a committee print.

4. July 13 was a Friday. On Tuesday, July 17, with but one intervening business day after Chairman Engman's statement that the staff report had not been evaluated

by the Commission and its public release would be "inconsistent with the Commission's duty to proceed judiciously and responsibly" in the premises, a Commission news release stated that it was issuing the complaint in Docket No. 8934. On July 18 the complaint was issued bearing that date.

5. The Commission denied Socal's motion to dismiss or withdraw the complaint, refused Socal any discovery on the "reason to believe" issue, and stated that the issue would not be considered in hearings in the case and was absolutely immune from judicial review (Commission order, June 4, 1974).[5]

The Ninth Circuit concluded that "the allegations support Socal's claim" that the Commission had violated its statutory duty and based its action on legally improper considerations (Pet., Appx. B, pp. 12a-13a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. **Socal's Complaint Plainly States A Claim For Relief; The Commission Must Adhere To Statutory Requirements Of Its Organic Act.**

The Commission's announcement of its complaint against Socal and other oil companies with but one intervening business day after Senator Jackson released the Preliminary Staff Report for publication reveals how the Commission felt the political pressure once the report was

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[5]The Commission acknowledged in the same order (printed as Appx. E to the petition) that it had received communications from members of Congress before the Commissioners issued the complaint, and offered the self-serving assurance that "None of the communications received by this agency from any member of Congress is even remotely of the character deemed improper by the courts." *No court knows what those communications were.*

published.[6] As the Ninth Circuit held, Socal's allegations support a reasonable inference that the Commission caved in to political pressures from congressmen anxious to find a scapegoat for the first peacetime shortages of gasoline and fuel oil in the nation's history, and that the Commission could not, in the far-reaching and complex circumstances in question, have been able to ascertain the relevant facts and make a good faith determination of reason to believe that Socal had violated section 5.[7]

The petition seeks to convey the false impression that the opinion below is "unprecedented" (Pet., p. 9). To the contrary, while the facts alleged are unusual, the issue is controlled by principle and precedent from the inception of the Court. There is simply no place for the Commission's assertion of an unreviewable power in the face of an express statutory limitation imposed by the Congress on the Commission's authority to issue complaints. Chief Justice Marshall put the query in *Marbury* v. *Madison* (1803) 1 Cranch. (5 U.S.) 137, 176:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

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[6]As The New York Times said on March 16, 1975: "Once the report was out, congressional sources other than Senator Jackson said that the Commission was under great political pressure to file a complaint."

[7]In *Hunt Foods and Industries, Inc.* v. *F.T.C.* (9 Cir. 1961) 286 F.2d 803, 806, certiorari denied (1961) 365 U.S. 877, the court said: "The Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts."

The Ninth Circuit's decision is firmly grounded in legal principles, codified in the Administrative Procedure Act, which guarantee judicial review of agency action that is contrary to statutory command or arbitrarily based on impermissible factors. Section 706 of the APA provides that a reviewing court shall "hold unlawful and set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

In *Schilling* v. *Rogers* (1960) 363 U.S. 666, 676-677, on which the Commission asserts reliance (Pet., p. 12), the Court, in a decision under the Trading With The Enemy Act, pointed out that:

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here."

It is precisely Socal's allegation that the Commission "refused or failed to exercise a statutory discretion" and "acted beyond the scope of its powers" as conferred by the Congress in section 5 of the Federal Trade Commission Act, by failing to make a good faith determination that it had reason to believe that Socal had violated the law. Socal's claim is not that the Commission's prosecutorial discretion is subject to untrammeled judicial review, as the petition erroneously suggests (Pet., p. 15), but that the Commission's failure to exercise its discretion in determining reason to believe, as mandated by the statute, may

be corrected. Prosecutorial discretion involving an exercise of discretion on the facts, or a determination of Commission enforcement policy, or an exercise of "the Commission's undisputed responsibility to decide what kinds of business conduct may be unfair" (Pet., p. 13), is not involved in this case.

In *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, the Court rejected the view that agency decisions on complaint issuance are immune from judicial review for any reason, and rejected the "all or nothing" approach to judicial review advanced by the Commission in the instant case (Pet., pp. 12-13). The Court concluded that a decision by the Secretary of Labor not to file suit under the Labor-Management Reporting and Disclosure Act could be reviewed to insure that he had discharged his statutory duty to the plaintiff:

> "[C]ourts 'are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes to plaintiffs under the powers granted by the Congress. [Citing authorities]' " (421 U.S. 568).

The Court held that a limited review of a particular complaint issuance decision was not inconsistent with the Secretary's exercise of broad discretion to initiate proceedings, and served "to assure careful administrative consideration" of the action taken (421 U.S. 572). Thus, although "review may not extend to cognizance or trial of * * * the factual bases for the Secretary's conclusion," a court was required to "determine whether the Secretary's

decision was reached for an impermissible reason or for no reason at all" (421 U.S. 573).

In *Morgan* v. *United States* (1936) 298 U.S. 468, 480, the Court ruled that "[f]acts and circumstances must not be considered which should not legally influence the conclusion." Judge Learned Hand stated in *United States* v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491, that agency action may not be premised on "considerations that Congress could not have intended to make relevant."[8]

The Ninth Circuit decision in the instant case is in full accord with these principles.

The Commission's contention that its complaint issuance is *entirely* "committed to agency discretion by law" and unreviewable ignores the specific language of the APA, which precludes judicial review only *"to the extent that"* agency action is so committed (5 U.S.C. § 701). As the Court recognized in *Dunlop* v. *Bachowski,* supra, this ex-

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[8]Courts regularly review prosecutorial and administrative decisions made on extraneous grounds (e.g., *United States* v. *Falk* (7 Cir. 1973) 479 F.2d 616, 624 (*en banc*); *Medical Com. for Human Rts.* v. *Securities & Exch. Com'n* (D.C. Cir. 1970) 432 F.2d 659, 673, vacated on other grounds (1972) 404 U.S. 403; *DeVito* v. *Shultz* (D.D.C. 1969) 300 F.Supp. 381, 382, 384). Ever since *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, it has been settled that the institution of proceedings for an improper purpose must be subject to correction in the courts.

The petition concedes (p. 15, n. 15): "While the discretion to institute administrative proceedings, like the discretion to bring criminal charges, is extremely broad, 'there are undoubtedly constitutional limits on its exercise.' *Bordenkircher* v. *Hayes,* 434 U.S. 357, 365 (1978)." The petition then later erroneously asserts (p. 21, n. 19): "The question whether the Commission made an 'independent' 'reason to believe' determination is clearly not of constitutional scope." To the contrary, that question clearly *is* of constitutional scope. Due process, as the cited cases show, has never permitted individuals to be prosecuted without basis for belief that they might have violated the law.

ception prevents a court from "substitution of [its] judgment" for the Commission's judgment, but does not preclude a limited judicial review to insure that the Commission exercised its discretion on the facts (421 U.S. 572).

There is no statutory prescription against judicial review in the instant case. In such circumstances, the Commission "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision" (*Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 567). Judicial review will be cut off entirely "only upon a showing of 'clear and convincing evidence' " of legislative intent to do so (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 141). The petition points to no such clear and convincing evidence in the history of the Federal Trade Commission Act. The fact that the Congress may have contemplated that the Commission exercise wide discretion in conducting *investigations* (Pet., p. 14) does not suggest a congressional intent that the Commission could disregard an express statutory requirement for the issuance of a complaint.[9]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410, the Court said that the committed-to-

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[9]On the contrary, the Commission acknowledged from its inception the statutory restriction imposed by the Congress on the issuance of complaints under section 5:

> "Reason to Believe—In view of the fact that the Commission is authorized to issue its complaint, not upon probable cause, but only upon grounds which give it 'reason to believe' that there has been a violation of the law, *the Commission is required to act,* and has acted, *with the utmost circumspection in the issuance of complaints* and the institution of proceedings. In all cases it makes a thorough preliminary investigation of the matters charged in order that no formal proceeding may be undertaken without an adequate foundation" (FTC Annual Report, June 30, 1916, p. 6, emphasis supplied).

agency-discretion exception to judicial review of 5 U.S.C. § 701(a)(2) "is a very narrow exception" which applies only "in those rare instances where 'statutes are drawn in such broad terms that * * * there is no law to apply.'" Here, there is law to apply under section 5 of the Federal Trade Commission Act, namely, that the Commission must make a good faith evaluation of whether there is reason to believe that Socal violated the law and must not issue its complaint on the basis of impermissible political factors.

Section 13 of the Federal Trade Commission Act (15 U.S.C. § 53) provides that "[w]henever the Commission has reason to believe" that a person is violating the Act, it may upon a proper showing in district court obtain an injunction pending the trial of a Commission complaint. The statutory "reason to believe" language of section 13 is a precise parallel to that of section 5 (15 U.S.C. § 45) here involved. Invoking section 13, the Commission applied for an injunction against the merger of British Oxygen Company and Airco, alleging that it had reason to believe the merger might be in violation of law. The court of appeals stated:

> "§ 13(b) requires that the Commission show the district court that it has 'reason to believe' a violation has occurred * * *" (*F.T.C.* v. *British Oxygen Co., Ltd.* (3 Cir. 1976) 529 F.2d 196, 199 (*en banc*)).

See also, *Federal Trade Commission* v. *Rhodes Pharmacal Co.* (7 Cir. 1951) 191 F.2d 744, 747-748. If the reason to believe requirement provides "law to apply" under section 13 of the Federal Trade Commission Act, it equally affords "law to apply" under section 5.

Southern Ry. Co. v. *Seaboard Allied Milling Corp.* (1979) ..... U.S. ....., 99 S.Ct. 2388, on which the Commission asserts reliance (Pet., pp. 8, 11, 15), recognizes the availability of judicial review in the circumstances alleged at bar. There was in *Seaboard* no allegation that the Interstate Commerce Commission had failed to perform a statutory duty. The Court distinguished the permissive provision of section 15(8)(a) of the Interstate Commerce Act involved in that case, which it held created no reviewable duty, from the mandatory language in section 13(1) of the Act, which did create a reviewable duty. Section 15(8)(a) provided that "'the Commission *may*, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of [a] rate.'" The Court stated:

> "Congress did not use permissive language such as that found in § 15(8)(a) when it wished to create reviewable duties under the Act. Instead it used mandatory language * * *. In particular, § 13(1), which plainly authorizes rate-investigation decisions that are reviewable * * * provides that '[i]f . . . there shall appear to be any reasonable ground for investigating said complaint, it *shall* be the duty of the Commission to investigate the matter complained of * * *'" (99 S.Ct. 2395).

Section 13(1), creating a reviewable duty, is the analog of section 5 of the Federal Trade Commission Act, which provides that the Commission "*shall* have reason to believe" that a violation of the Act has occurred before issuing a complaint.[10]

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[10]Moreover, in both the *Seaboard* case and *Morris* v. *Gressette* (1977) 432 U.S. 491 (Pet., pp. 11, 12, 15), the Court's decision rested significantly on the fact that other avenues of judicial review were available to aggrieved parties. In *Morris*, the Attorney

What if the Commission's files contain a memorandum of a Commissioner saying, "We do not have anything to indicate that Socal has violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway"? The Commission's contention of absolute unreviewability would render such agency conduct immune from correction by the courts. Under the rule of law, an opportunity must be afforded to present such a document in a court of law.

2. Enforcement Of Statutory Duty In The Issuance Of Commission Complaints Would Not Impair The Work Of The Commission Or The Courts.

The tone of the petition is not attention to the rule of law, but hyperbole—*in terrorem* assertions that compliance with the statutory standard of section 5 of the Federal Trade Commission Act in accordance with the "unprecedented decision" of the Ninth Circuit would "undermine the effective and orderly conduct of enforcement proceedings" and permit respondents to "engage in disruptive and dilatory litigation of ancillary procedural issues in the courts" (Pet., p. 9; see also Appx. F, p. 33a).

General's failure to object to a change in state voting laws was "not conclusive with respect to the constitutionality of the submitted state legislation" which was subject to "a subsequent action to enjoin [its] enforcement" (432 U.S. 505). In *Seaboard*, the Court emphasized:

> "Nor, in fact, are we holding entirely unreviewable the Commission's exercise of its rate-investigation authority. For any shipper may require the Commission to investigate the lawfulness of any rate at any time—and may secure judicial review of any decision not to do so—by filing a § 13(1) complaint" (99 S.Ct. 2394).

In the instant case, in contrast, Socal has no other way in which to obtain judicial review of the Commission's unlawful failure to comply with its organic act (see pp. 19-22, infra).

This is groundless exaggeration. The Commission ordinarily issues complaints only after an investigation. The complaint issuance here in dispute—arising out of political pressures in the first peacetime gasoline and fuel oil shortages in our history—is obviously unusual.[11]

In *Chattanooga Pharm. Ass'n* v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 864, the Department of Justice contended that its issuance of a Civil Investigative Demand under a statute authorizing such demands only when the Department "has reason to believe that [the] person under investigation may be in possession * * * of material relevant to a civil antitrust investigation" was immune from judicial review, and that the court should infer from the demand that the Department had reason to issue it—an argument equivalent to the Commission's contention here that its mere recital of reason to believe should preclude any judicial review of its complaint issuance decision (Pet., p. 13). The court of appeals affirmed the setting aside of a demand alleged to have issued for improper reasons:

> "We are not persuaded that a simple denial and, if necessary, proof contradictory of, the misuse of process charged to the Department would 'create a precedent which might seriously prejudice future administration of the Civil Investigative Demand statute'" (358 F.2d 866-867).

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[11]Rule 11 of the Federal Rules of Civil Procedure requires the attorney signing a complaint to have good grounds for the wrongs or irregularities alleged. Even the letter from agency counsel to the Solicitor General (Appx. F to Pet.) acknowledges that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Appx. F, pp. 32a-33a).

In *Accardi* v. *Shaughnessy* (1954) 347 U.S. 260, Accardi alleged that the Board of Immigration Appeals had declined to suspend a deportation order because the Attorney General had included his name on a list of "unsavory characters," rather than on the basis of the Board's own judgment on the record before it. The court of appeals held that an allegation that the Board "considered other matters" was legally insufficient because, if it were, "every deportable alien would so allege, merely to delay his justifiable deportation" (206 F.2d 901). This Court reversed, holding that Accardi was entitled to prove his allegation that the Board did not exercise its own judgment, but followed the dictates of the Attorney General. The asserted potential for burden on the courts and delay of the Board's process was not allowed to block the right to a lawful hearing. No more may the Commission here evade its obligation to comply with legal requirements of its organic act.

The Commission's asserted forebodings in the case at bar also ignore the fact that the district courts have ample powers to control discovery and to avoid unnecessary probing of the Commission's "deliberative process" (Pet., p. 2). The presumption of administrative regularity normally precludes inquiry into the "mental processes" of the Commissioners (Pet., p. 16; see *United States* v. *Morgan* (1941) 313 U.S. 409), but the presumption is not irrebutable, as the petition implies. Many decisions establish that, where a plaintiff makes a prima facie showing of irregularity, the court may permit further inquiry

necessary to resolve claims of administrative failure to adhere to the rule of law:

> "[T]he mental process rule [of the *Morgan* case] is but 'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies * * * . [W]here a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable [citing numerous cases]" (*Singer Sewing Machine Company* v. *N.L.R.B.* (4 Cir. 1964) 329 F.2d 200, 208).[12]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 420, the Court affirmed that a court "may require the administrative officials who participated in the decision to give testimony explaining their action." Inquiry into the mental processes of administrative decision makers, while usually to be avoided, may and should be allowed upon a strong showing of administrative irregularity. In the instant case, Socal's allegations, which the Ninth Circuit held supported a reasonable inference that the Commission had violated its statutory mandate, stand admitted on motion to dismiss the complaint.[13]

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[12]Accord, see, e.g., *United States* v. *Nixon* (1974) 418 U.S. 683, 706, 709; *D.C. Federation of Civic Associations* v. *Volpe* (D.C.Cir. 1972) 459 F.2d 1231, 1248, certiorari denied (1972) 405 U.S. 1030; *Sun Oil Company* v. *United States* (Ct.Cl. 1975) 514 F.2d 1020, 1024-1025; *KFC National Management Corp.* v. *N.L.R.B.* (2 Cir. 1974) 497 F.2d 298, 305; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.C.Cir. 1971) 463 F.2d 788; *Peoples* v. *United States Department of Agriculture* (D.C.Cir. 1970) 427 F.2d 561, 567; *Bank of Dearborn* v. *Saxon* (E.D.Mich. 1965) 244 F.Supp. 394, affirmed (6 Cir. 1967) 377 F.2d 496.

[13]In *Dunlop* v. *Bachowski*, supra, 421 U.S. 560, the Court likewise recognized that, absent any showing of irregularity, a statement by the Secretary of Labor of his reasons for refusing to issue a complaint would be sufficient for judicial review, but that the unusual case involving evidence that the Secretary's "decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act'" would be "a matter of grave public concern" justifying further judicial inquiry (421 U.S. 574). This is such a case.

3. Socal Has No Avenue Of Judicial Review Except Its Suit In District Court.

The Commission's contention that its order (Pet., Appx. E) refusing Socal any discovery or hearing on the reason to believe issue is not "final agency action" subject to judicial review (Pet., p. 17) disregards this Court's repeated admonition that the "generous" review provisions of the APA must be given a "hospitable interpretation," and that "the cases dealing with judicial review of administrative action have interpreted the 'finality' element in a pragmatic way" (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 149). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost" (*Mathews* v. *Eldridge* (1976) 424 U.S. 319, 331, n. 11; cf. *Cohen* v *Beneficial Loan Corp.* (1949) 337 U.S. 541, 546).

The Administrative Procedure Act specifies that agency action "subject to judicial review" includes "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. § 704). The legislative history of the Act makes clear that this language was to receive a practical construction, not a technical parsing such as that advanced in the present petition:

> "The Committee on the Judiciary of both the House and the Senate included in their reports a statement that " 'final action includes any effective agency action for which there is no other adequate remedy in any court' * * *. We thus construe 'final action' as used in § 10(c) of the Administrative Procedure Act [5 U.S.C. § 704] * * * to mean what the Committee

said it meant" (*Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 865-866).[14]

In the instant case, Socal has no avenue to obtain judicial review of the Commission's unlawful conduct other than its suit in the district court. The Commission's argument that Socal may obtain review of its contention that the complaint was unlawfully issued upon final review of any cease and desist order that may ultimately be entered in Docket No. 8934 a decade or more in the future is incorrect both as a practical matter and as a legal matter.

As a practical matter, it is preposterous to suggest that a court of appeals, a decade or more hence, after entry of a cease and desist order in a massive Commission proceeding, would vacate the order even though it was supported by substantial evidence and remand the case for further proceedings to determine whether the Commission had adhered to a statutory requirement when it issued the complaint back in 1973.

As a legal matter, the courts of appeals have held that on review of a Commission cease and desist order, the only question before them is whether the order is supported by substantial evidence, not whether there was lawful basis for issuance of the complaint in the first instance

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[14]In the leading *Deering Milliken* case, Chief Judge Haynsworth affirmed an injunction against an interlocutory remand order by the National Labor Relations Board that had been challenged as violative of section 6(a) of the Administrative Procedure Act, which requires the Board to "proceed with reasonable dispatch to conclude any matter presented to it." The court realized that plaintiff's legal contention could not be remedied on review of any final Board order in the proceedings. In the same fashion, respondent in the instant case has no other adequate remedy to vindicate its claim.

(*Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155; *Elmo Division of Drive-X Company* v. *Dixon* (D.C. Cir. 1965) 348 F.2d 342, 344 ("[t]he prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. The type of procedural error appellant asserts is not of a kind which affects the Commission's substantive findings")). In *Jewel Companies, Inc.* v. *FTC,* supra, the court held that appellate review of a Commission cease and desist order was not an adequate remedy for a claim that a Commission complaint had been invalidly issued upon the irregular vote of one Commissioner:

> "If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, *the standard of review will be different. At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint.* As in *Skinner & Eddy* [*Skinner & Eddy Corp.* v. *United States* (1919) 249 U.S. 557], 'the so-called administrative remedy was without relevance to the plaintiff's claim'" (432 F.2d 1159, emphasis supplied).

The Commission's argument (Pet., pp. 20-21) that heavy expenses of exhausting an administrative remedy will not justify *pre-exhaustion* judicial review and that "irreparable injury" and "clear violation" of law must be shown to justify pre-exhaustion judicial review have no bearing on the issue at hand. Heavy expenses may be required *to exhaust an available remedy, but Socal has no other remedy to exhaust* on issuance of the complaint in Docket No. 8934. Similarly, the requirements of "irrepar-

able injury" and "clear violation" of law are imposed where there is a remedy that could be exhausted. The point here is that Socal does not have any remedy for the Commission's unlawful action except the suit it filed in district court.

The Commission admitted in the court below that Socal has no other avenue of judicial relief and that ultimate appellate review of a cease and desist order would not extend to the unlawful complaint issuance in this case because of the applicable standard of review and the doctrine of harmless error (Brief for the Appellees, pp. 42-45). But the Commission nevertheless argues in this Court that its unlawful action is not subject to review in district court either. The Commission's erroneous argument would rewrite the review provisions of the APA and open the door to the most obvious abuses of administrative power free from judicial correction at any time.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GEORGE A. SEARS
RICHARD W. ODGERS
C. DOUGLAS FLOYD
Attorneys for Respondent

PILLSBURY, MADISON & SUTRO
Of Counsel

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FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel
Federal Trade Commission
Washington, D.C. 20580

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REPLY BRIEF FOR THE PETITIONERS

1. Respondent erroneously asserts (Br. in Opp. 3) that "[t]his is a pleading case" and that the sole issue is whether its district court complaint alleges facts sufficient to state a claim for relief. This assertion begs the principal question decided by the court of appeals and presented in our petition—the question of the reviewability of whether the Commission actually made a "reason to believe" determination prior to issuing an administrative complaint.[1]

[1]Respondent claims (Br. in Opp. 7-8) that the Commission issued its administrative complaint because it yielded to congressional pressures instead of independently finding "reason to believe." At most, however, respondent's complaint alleges a congressional inquiry into the relationship between the structure of the petroleum industry and shortages of petroleum products. The Commission's investigation into possible unfair methods of competition,

As we have shown in the petition (Pet. 13), a "reason to believe" determination, which is analogous to a finding of probable cause, has no independent significance apart from the supporting factual allegations in the complaint. Moreover, an administrative finding of "reason to believe" has no binding legal effect in and of itself. It simply institutes a hearing procedure that ultimately may culminate either in the issuance of a cease and desist order or in dismissal of the proceeding. In a similar situation this Court held that administrative "probable cause" determinations are not judicially reviewable, even when their immediate consequence is the seizure of property. *Ewing* v. *Mytinger & Casselberry, Inc.* 339 U.S. 594 (1950). The Court recognized that "[t]he harm to property and business can * * * be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." *Id.* at 599. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 146-148 (1967). A fortiori, a "reason to believe" determination—whose only consequence is that a respondent in an administrative proceeding must defend against the allegations in the complaint—should not be reviewable, particularly where Congress has provided for adequate review of any final cease and desist order at the

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however—a subject different from the question of shortages—was carried on for 18 months before the complaint was issued (Pet. 5-6). If the mere chronological coincidence of congressional inquiries and Commission investigations may subject initiation of Commission proceedings to collateral challenge in the district courts, then every major agency proceeding addressing matters of current and substantial public interest is likely to be threatened with disruption at the outset by claims of "political" influence.

conclusion of the proceeding. See *Ewing* v. *Mytinger & Casselberry Inc.*, supra, 339 U.S. at 600-601.

2. Respondent's primary contention (Br. in Opp. 1, 8) is that the questions presented in our petition are governed by settled legal principles established in this Court's earlier decisions. However, the authorities upon which respondent relies do not support this contention.

This Court's decision in *Schilling* v. *Rogers*, 363 U.S. 666 (1960), does not, as respondent contends (Br. in Opp. 9), indicate that agency decisions to issue administrative complaints are judicially reviewable. To the contrary, after examining the terms and history of the Trading with the Enemy Act, the Court in *Schilling* concluded that the refusal of the alien property custodian to return vested property was not reviewable. As we noted in the petition (Pet. 12), the Court has consistently engaged in this type of analysis in determining whether agency action is committed to the agency's unreviewable discretion. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979).[2]

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[2]Respondent relies (Br. in Opp. 9) upon language in *Schilling* v. *Rogers*, *supra*, that suggests that judicial review may be available where "it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers." 363 U.S. at 676-677, citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) and *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Neither *Accardi* nor *Leedom* involved the reviewability of a decision to initiate administrative proceedings. *Accardi* concerned the failure of the Board of Immigration Appeals to exercise independent authority conferred on it by regulation. Absent judicial review, the Board's failure to act would have resulted in immediate deportation of an alien. In contrast to *Accardi*, the Commission's "reason to believe" determination has no legal consequence beyond the institution of administrative proceedings. *Leedom* involved a decision by the National Labor Relations Board to include professional employees

Respondent's reliance (Br. in Opp. 10-12) on *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is similarly misplaced. In that case the Court held that a decision by the Secretary of Labor *not* to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959 to set aside an allegedly invalid union election was subject to limited judicial review at the behest of parties protected by that Act. The Court explained that judicial review was available because Congress had imposed upon the Secretary a mandatory duty owed to parties protected by the Act. *Id.* at 568. Cf. *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Nothing in *Bachowski* suggests that an affirmative decision by the Secretary to initiate an action is independently reviewable. Here, unlike in *Bachowski*, it is settled that a decision by the Federal Trade Commission not to issue an administrative complaint is not subject to judicial review. See *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929). And, as we have demonstrated in the petition (Pet. 12-14), the statutory scheme reflects Congress' intent to insulate from judicial review the Commission's determination in favor of instituting administrative proceedings.

Nor can respondent draw support from Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b) (Br. in Opp. 13). That Section provides that the Commission may seek a preliminary injunction in the district court "[w]henever the Commission has reason to believe" (1) that a violation of any provision of law

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in a collective bargaining unit without first determining, as required by statute, whether a majority of such professional employees would vote for inclusion in such a unit. The Court held that the Board's violation of an express statutory prohibition deprived the professional employees of a right provided by Congress, and that judicial review was available to prevent deprivation of that right. No such consequence follows from the Commission's discretionary action here in initiating administrative proceedings.

enforced by the Commission is occurring or is about to occur; and (2) that it would be in the public interest to enjoin the alleged violation "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review * * * ." The district court may grant such an injunction only "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest * * *."

No court has ever held that the Commission's decision to seek a preliminary injunction is reviewable on the ground that the Commission failed to make a "reason to believe" determination that a violation was occurring or was about to occur. Instead, in determining whether to grant relief under Section 13(b), the courts have focused on whether the Commission has met its burden of showing the likelihood of ultimate success on the merits. See *FTC* v. *National Tea Co.*, 603 F. 2d 694, 698 (8th Cir. 1979). Obviously, if the Commission fails to support the allegations reflecting its "reason to believe," it has not shown that success on the merits is likely, and the district court must therefore deny the injunction. See *FTC* v. *British Oxygen Co.*, 529 F. 2d 196, 199 (3d Cir. 1976) (en banc). Even where an injunction has been denied, however, Section 13(b) does not authorize the district court either to review the Commission's subsequent determination to issue an administrative complaint, or to enjoin the ensuing administrative proceeding.

Respondent similarly errs in asserting (Br. in Opp. 14) that the "reason to believe" provision in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, is analogous to Section 13(1) of the Interstate Commerce

Act, 49 U.S.C. (1976 ed.) 13(1).[3] Section 13(1) requires the Interstate Commerce Commission to provide a forum in which shippers may assert damages claims against carriers for violations of the Act.[4] See, *e.g.*, *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). Section 5 of the Federal Trade Commission Act, however, does not create such a private remedy. See *FTC* v. *Klesner, supra*, 280 U.S. at 25-26. Under respondent's analogy, Section 5 would permit judicial review of the Commission's decision not to issue an administrative complaint. But *Klesner* demonstrates that review is unavailable in those circumstances.[5]

3. Respondent contends (Br. in Opp. 19-22) that the initiation of administrative proceedings constitutes "final agency action" within the meaning of 5 U.S.C. 704. There is no merit to this contention.

The legislative history cited in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 865 (4th Cir. 1961), and upon which respondent relies (Br. in Opp. 19-20), demonstrates that Congress intended "final action" to include " 'any effective agency action for which there is no other adequate remedy in any court.' " But the filing

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[3]This provision has been recodified by Pub. L. No. 95-473, 92 Stat. 1449, as 49 U.S.C. 11701(b).

[4]In the alternative, shippers may elect to pursue remedies against carriers directly in the courts. See 49 U.S.C. (1976 ed.) 8, 9.

[5]Respondent's citation (Br. in Opp. 16) of *Chattanooga Pharmaceutical Ass'n* v. *United States Department of Justice*, 358 F. 2d 864 (6th Cir. 1966), is equally unavailing. That case involved a petition for review of a civil investigative demand issued by the Department of Justice under the Antitrust Civil Process Act. Under 15 U.S.C. 1314 the district court had explicit statutory jurisdiction to review the issuance of the demand. No similar basis for review exists here.

of an administrative complaint has no legal effect other than to initiate a proceeding, and accordingly it does not amount to final action for purposes of judicial review anymore than does the filing of a complaint in court by a United States Attorney. Thus, regardless whether or not the issuance of the complaint is reviewable after the entry of a cease and desist order, it is clear that review is not available at this stage of the proceedings.

Although we disagree with the decisions in *Jewel Companies, Inc.* v. *FTC*, 432 F. 2d 1155 (7th Cir. 1970) and *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965), cited by respondent (Br. in Opp. 21), those cases are inapposite in any event. The preliminary issues held reviewable in those cases involved pure questions of law and, unlike this case, did not require any inquiry into either the thought-processes of the individual Commissioners, or the manner in which the Commission as a body exercised its responsibility to determine whether there was "reason to believe" that a violation occurred.[6] It may be necessary, in certain narrow circumstances, to afford review of purely legal questions that otherwise would be unreviewable under the exhaustion doctrine set forth in *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969). See, *e.g.*, *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 574-577 (2d Cir. 1979). The issues presented by respondent, however, if reviewable at all, must, under *McKart*, await completion of the administrative process.

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[6]In *Jewel Companies*, the question was whether one Commissioner had correctly concluded that he had no discretion to vote against issuance of a complaint on public interest grounds if "reason to believe" otherwise existed. In *Elmo Division*, the Commission attempted to reopen a matter subject to a prior consent order.

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MICHAEL N. SOHN
General Counsel
Federal Trade Commission

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BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

JOANNE L. LEVINE
MARK W. HAASE
Attorneys
Federal Trade Commission
Washington, D.C. 20580

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G. Henderson, *The Federal Trade Commission* (1924) 31
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Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968) 26
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-66) is reported at 596 F.2d 1381. The order of the district court (Pet. App. 1a-2a) is not reported. The order of the Commission denying respondent's motion to dismiss the complaint (Pet. App. 27a-28a) is not reported. The order of the Commission denying respondent's motion for reconsideration (Pet. App. 29a-31a) is reported at 83 F.T.C. 1759.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1979. A petition for rehearing en banc was denied on August 6, 1979 (Pet. App. 23a-24a). On October 29, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 10, 1979. The petition was filed on December 10, 1979, and was granted on February 25, 1980 (A. 67). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's deliberative process prior to issuing a facially valid administrative complaint stating that it has "reason to believe" that certain firms are engaged in unfair methods of competition, with supporting allegations, is "agency action * * * committed to agency discretion by law" and thus not subject to judicial review under 5 U.S.C. 701(a)(2).

2. If the Commission's decision to issue an administrative complaint is not "committed to agency discretion by law," whether that decision constitutes "final agency action" (5 U.S.C. 704) subject to immediate judicial review during the pendency of the ensuing administrative proceeding.

STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act ("FTC Act") (15 U.S.C. 45) and

the judicial review provisions of the Administrative Procedure Act ("APA") (5 U.S.C. 701-706) are set forth at Pet. App. 25a-26a.

STATEMENT

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), empowers and directs the Federal Trade Commission to prevent unfair methods of competition, and unfair and deceptive acts or practices in or affecting commerce. Section 5(b) of the Act, 15 U.S.C. 45(b), provides that the Commission may issue complaints whenever it "shall have reason to believe" that an enterprise has been or is using unfair methods of competition or unfair and deceptive acts and practices, and "if it shall appear to the Commission that a proceeding in respect thereof would be to the interest of the public." If, after hearings upon a complaint giving notice of alleged violations, the Commission finds that a respondent has engaged in unfair or deceptive acts or practices, it may issue a cease and desist order remedying the violation. Such orders do not become operative until they are finally sustained on judicial review, or the time for seeking review has expired. 15 U.S.C. 45(c).[1]

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[1] Persons required by the Commission's order to cease and desist particular acts or practices may, within sixty days after the order has been issued, petition the appropriate court of appeals for judicial review. The court of appeals' decision is subject to review by this Court on petition for a writ of certiorari. 15 U.S.C. 45(c).

A. Proceedings Before the Commission

On July 18, 1973, the Commission, through its Secretary, issued a certified administrative complaint (J.A. 19-27) charging that respondent Standard Oil Company of California ("SOCAL") and seven other major oil companies were engaged in unfair methods of competition, in violation of 15 U.S.C. 45(a), by maintaining a noncompetitive market structure and exercising monopoly power in the refining of crude oil into petroleum products. *In re Exxon Corporation, et al.*, Docket No. 8934 (*"Exxon"*). The complaint stated that the Commission had "reason to believe that the above-named respondents have violated and are now violating [15 U.S.C. 45]" and that formal adjudicatory proceedings with respect to the alleged violation would be "in the public interest" (J.A. 19-20). The complaint contained allegations describing the manner in which respondent and the other named oil companies were said to be in violation of the law (J.A. 23-26).[2] The complaint gave notice that in the

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[2] The administrative complaint alleged, *inter alia*, that the eight respondents, including SOCAL, engaged in the following acts and practices (J.A. 23-24): adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil; entering into numerous processing arrangements with independent refiners thereby limiting the availability of refined petroleum products to independent marketers; keeping profits at the crude level artificially high and at the refining level artificially low, thereby raising entry barriers to refining; refusing to sell gasoline and other refined petroleum products to independent marketers; and avoiding

event the Commission should conclude from the record developed in an adjudicative proceeding that the respondents are in violation of Section 5, as alleged, the Commission "may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by respondents and to restore competition in the relevant market or markets" (J.A. 27).

In January 1974, respondent filed a motion to dismiss the administrative complaint, contending that the Commission had issued the complaint in response to congressional pressure and without "reason to believe" that a violation had occurred and, further, that the proceeding was not in the public interest. The Commission denied the motion to dismiss (Pet. App. 27a). It also denied a motion for reconsideration, on the ground that "[o]nce the Commission has resolved [the "reason to believe" and

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price competition in the marketing of refined petroleum products.

The administrative complaint further alleged that the respondents' acts and practices have had, among others, the following effects (J.A. 24-25): artificial price levels in the petroleum industry; increased barriers to entry into the refining of petroleum products; lessening of actual and potential competition; shortages of petroleum products in areas of the nation where independent refiners and marketers are located, thus eliminating price competition and resulting in the closing or curtailing of independent retail operations; increased profits for the respondents in excess of profits obtainable in a competitively structured market; and higher consumer prices than would be payable in a competitively structured market.

"public interest"] questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (Pet. App. 30a).[3]

Following the denial of respondent's motions, the administrative proceeding went forward. The proceeding is still pending.

B. Proceedings in the Courts Below

On May 1, 1975, respondent filed a civil action in the United States District Court for the Northern District of California, seeking an order compelling dismissal or withdrawal of the Commission's administrative complaint (J.A. 3-18).[4] Respondent alleged that at the time it authorized the issuance of the complaint the Commission did not possess facts suf-

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[3] The Commission noted that both the adequacy of its determination that there is "reason to believe" that a violation of law has occurred and its belief that an adjudicatory proceeding is in the "public interest" are matters "that go to the mental processes of the Commissioners" and thus are not reviewable by the courts (Pet. App. 30a). In addition, the Commission observed that none of the communications received from members of Congress prior to the issuance of the complaint "is even remotely of the character deemed improper by the courts" (*id.* at 29a-30a, citing, *e.g.*, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966)).

[4] The district court complaint named the Commission and its individual members as defendants.

ficient to support a reasonable belief that respondent had violated the law; that the Commission did not reasonably consider the facts in issuing the complaint; and that the Commission's initiation of administrative proceedings was the result of improper consideration of congressional pressure and legally irrelevant political and economic factors (J.A. 15).[5]

The Commission moved to dismiss the action (J.A. 50). The district court concluded that the issuance of the administrative complaint by the Commission was not subject to judicial review (J.A. 51-52) and, accordingly, granted the Commission's motion to dismiss (Pet. App. 1a-2a).[6]

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[5] The evidence cited in support of respondent's complaint consisted mainly of: (1) the allegedly minimal use of compulsory process directed at SOCAL during the Commission's investigation preceding the issuance of the complaint; (2) the coincidence of the *Exxon* complaint with congressional inquiries into the Commission's activities regarding the petroleum industry; (3) the inclusion of standard cautionary language in a preliminary staff report requested by a member of Congress and in the Commission's letter accompanying the report; and (4) the amount of discovery requested by counsel supporting the complaint and counsel's unwillingness to limit proposed witnesses or evidence to persons or documents designated prior to completion of discovery (J.A. 6-15).

[6] At the conclusion of oral argument, the district judge stated: "I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under the most unusual circumstances, would be productive of nothing more than chaos" (J.A. 52).

A divided panel of the court appeals vacated the judgment of dismissal and remanded the case to the district court for further proceedings. The court rejected the Commission's contention that issuance of the complaint is not "agency action" as defined in the Administrative Procedure Act (5 U.S.C. 551 (13)).[7] It held that the APA's definition is illustrative, not exclusive; that courts must presume the availability of judicial review under the APA unless Congress clearly indicates otherwise; and that because almost any act an agency takes can be "agency action," the proper question is whether the act in question "is reviewable agency action" (J.A. 56-57).

Turning to consider whether the Commission's issuance of an administrative complaint is a matter "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), the court acknowledged that "a determination by the Commission that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court" under the APA (J.A. 58). Nevertheless, it ruled that judicial review is available with respect to whether the Commission had in fact made the

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[7] 5 U.S.C. 551(13) provides:

> "[A]gency action includes the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act."

The enumerated terms are defined in the following subsections of Section 551: (4) "rule"; (6) "order"; (8) "license"; (10) "sanction"; and (11) "relief".

requisite "reason to believe" determination, notwithstanding the recitation on the face of the administrative complaint that such a determination had been made (J.A. 59). The court viewed the "reason to believe" provision of 15 U.S.C. 45(b) as restricting the Commission's exercise of discretion to issue administrative complaints, and concluded that this restriction provides "law to apply" (*Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971)) to the Commission's action in issuing the complaint in question.

The court also concluded (J.A. 60-61) that the issuance of the administrative complaint constituted " 'final agency action' * * * for which there is no adequate remedy at law," and that such action is immediately reviewable in the district court under 5 U.S.C. 704. It reasoned that respondent had already exhausted its administrative remedies by raising its claim before the Commission. Moreover, it ruled that if respondent's claim were not subject to review at this stage of the proceeding it might never be reviewed, for three reasons: (1) in the event that respondent were to prevail in the administrative proceeding, its challenge to the issuance of the complaint would be moot; (2) if respondent sought to raise its claim upon review of a final cease and desist order, the record of the administrative proceedings in all likelihood would be insufficient for this purpose because the Commission's rejection of respondent's claim

would have foreclosed respondent from developing relevant facts; and (3) a court reviewing a cease and desist order is limited to considering whether substantial evidence supports the order and does not review alleged defects in the filing of a complaint (J.A. 61). The district court was directed to determine on remand whether the Commission made a "reason to believe" determination or "whether the complaint was issued solely because of outside pressure or with complete absence of a 'reason to believe' determination" (J.A. 60).

Judge Carter dissented (J.A. 61-66), on the ground that the Commission's action initiating an administrative proceeding is in essence an exercise of prosecutorial discretion and, as such, is exempted from judicial review under 5 U.S.C. 701(a)(2) (J.A. 62-63).[8] He noted that judicial inquiry into whether the Commission in fact made a "reason to believe" determination would improperly require the courts to probe the mental processes of the Commissioners (J.A. 63). Even assuming that respondent's claim may ultimately be subject to review, Judge Carter concluded (J.A. 64-66) that it is not reviewable while the administrative proceeding remains pend-

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[8] Judge Carter noted that in rare cases judicial inquiry may be permitted into whether the prosecutor's conduct falls outside the range of his discretion, but concluded that no such facts have been pleaded by respondent in this case (J.A. 63).

ing, since the issuance of an administrative complaint is merely a preliminary determination and is not "final agency action" within the meaning of 5 U.S.C. 704. In addition, he observed (J.A. 66) that respondent had failed to make a showing of "irreparable injury" necessary to overcome the rule requiring exhaustion of administrative remedies before judicial review may be sought. He predicted that under the majority ruling, "there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function" (J.A. 64).[9]

[9] The instant action is one of several cases seeking judicial review of the *Exxon* administrative proceeding. For example, in *Standard Oil (Ind.)* v. *FTC*, 475 F. Supp. 1261 (N.D. Ind. 1979), appeal dismissed, No. 79-448 (7th Cir. Dec. 5, 1979), other respondents in the *Exxon* proceeding brought suit challenging, *inter alia*, the Commission's "reason to believe" determination. *Id.* at 1269. The district court followed the Ninth Circuit's decision in the instant case and held that "the question of whether in fact a 'reason to believe' determination was made is reviewable * * *." *Id.* at 1270. The court concluded, however, that "the record indicates that the Commission did honor its statutory obligations" in issuing the administrative complaint. *Ibid.*

SUMMARY OF ARGUMENT

I

A. The Federal Trade Commission's decision to issue an administrative complaint instituting adjudicative proceedings against SOCAL is not judicially reviewable because it does not constitute "agency action" within the meaning of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701-706. The contrary decision of the court of appeals threatens disruption of the administrative process by permitting respondents in administrative proceedings to delay or impede those proceedings by seeking relief in the courts with respect to preliminary procedural matters. The Administrative Procedure Act was not intended to alter prior case law that establishes that preliminary orders such as those setting matters for hearing, are not independently reviewable in the courts.

None of the terms included in the definition of "agency action" (5 U.S.C. 551(13)) is remotely comparable to the issuance of an administrative complaint initiating an adjudicative proceeding. Only actions that have some dispositive effect on rights, privileges, duties or liabilities constitute reviewable "agency actions." The issuance of a complaint is not dispositive of anything because it has no "determinate consequences for the party to the proceeding." *ITT* v. *Local 134, IBEW*, 419 U.S. 428, 443 (1975).

B. Even if the Commission's decision to issue a complaint is "agency action," it nevertheless is "committed to agency discretion by law" and therefore

is exempted from judicial review by 5 U.S.C. 701 (a)(2). The court of appeals erroneously concluded that the "reason to believe" language in Section 5 (b) of the FTC Act imposes a substantive restriction on the Commission's discretion to issue complaints and that therefore the discretionary function exception of Section 701(a)(2) does not preclude the courts from considering the question whether the Commission in fact made a "reason to believe" determination prior to issuing the complaint. As the language, structure and legislative history of Section 5(b) demonstrate, however, for purposes of judicial review there is no meaningful distinction between the Commission's making a "reason to believe" determination that "unfair" methods of competition or acts and practices are being used, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief. If, as the court of appeals correctly held, the factual basis for the "reason to believe" determination is not reviewable, it follows that the deliberative process by which the Commission reaches that determination is also exempted from judicial review.

The discretion exercised by the Commission in deciding whether or not to institute an adjudicative proceeding is analogous to the discretion exercised by a prosecutor in deciding whether or not to bring criminal charges. Cases in both the criminal and administrative contexts support the conclusion that the exercise of such discretion is generally not subject to review.

Indeed, review of the Commission's decision to issue an administrative complaint would require the courts to go behind a certified and facially valid complaint to probe the mental processes of the Commissioners. The very nature of this inquiry suggests that the decision whether or not to institute proceedings is not an appropriate matter for the courts to review.

The traditional deference accorded to prosecutorial discretion and the reluctance of the courts to inquire into the deliberations of government officials reflects a strong presumption of regularity in the processes of government. The allegations in respondent's district court complaint are patently insufficient to overcome the strong presumption of regularity that attaches to the Commission's actions here.

II

Assuming arguendo that the Commission's decision to initiate a proceeding by issuing a complaint is "agency action" and thus ultimately reviewable, the court of appeals erred in holding it "final" agency action immediately reviewable in the district court while the administrative proceeding is still pending. The issuance of a complaint is merely the preliminary step in the administrative process and in no sense can be deemed "final" under 5 U.S.C. 704. The finality requirement of that section incorporates the requirement that, absent irreparable injury, a party must exhaust its administrative remedies before seeking relief in the courts. Here, respondent has neither exhausted its administrative remedies nor is it suffering irreparable injury by virtue of having to re-

spond in the administrative proceeding. In 15 U.S.C. 45(c) Congress provided an adequate remedy by authorizing review in the court of appeals of any final cease and desist order that the Commission may issue at the conclusion of the administrative proceeding. The court below erred in ignoring that statutory procedure.

ARGUMENT

I. THE FEDERAL TRADE COMMISSION'S ISSUANCE OF AN ADMINISTRATIVE COMPLAINT STATING ITS REASONS TO BELIEVE THAT THE RESPONDENTS ARE ENGAGED IN UNFAIR METHODS OF COMPETITION IS AN EXERCISE OF AGENCY DISCRETION NOT SUBJECT TO JUDICIAL REVIEW

A. The Decision to Issue an Administrative Complaint Is Not "Agency Action" Within the Meaning of 5 U.S.C. 701.

Under the Administrative Procedure Act, only "[a] person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. The term "agency action", as used in the judicial review provisions of the APA, is defined in 5 U.S.C. 551(13): " 'agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act * * *." [10] None of the terms included in the defini-

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[10] 5 U.S.C. 701(b)(2) expressly provides that for the purpose of the judicial review provisions of the APA, " 'agency action' [has] the meaning[] given [it] by section 551 of this

tion of agency action, and none of their equivalents, is even remotely comparable to the administrative step of issuing a complaint initiating a proceeding before an agency. See 5 U.S.C. 551(4), (6), (8), (10), (11).[11]

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title." The definition of "agency action" in Section 551 was intended to bring together terms defined elsewhere in that section in order to simplify the judicial review provisions of Sections 701-706. See S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21 (1946); *Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 197-198, 255 (1946).

[11] 5 U.S.C. 551 defines these terms as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate, or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing;
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> (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
>
> (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
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> (10) "sanction" includes the whole or a part of an agency—
>
> > (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
> >
> > (B) withholding of relief;

The court of appeals nevertheless concluded (J.A. 56-57) that issuance of the administrative complaint by the Commission constituted agency action because, it said, the statutory definition of agency action is merely illustrative, there is a presumption that judicial review is available under the APA, and almost any act an agency performs can be agency action. The court therefore concluded that the relevant question was not whether the issuance of the complaint was agency action but whether it was "reviewable" agency action under the APA. We submit that this analysis is flawed in several respects.

First, other courts that have focused on the definition of agency action in the Administrative Procedure Act have properly concluded that it "is not a general term with the all-embracing meaning usually

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(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person.

conveyed by those words * * *." *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948). Thus, "not every 'action' or activity undertaken by an agency constitutes 'agency action' within the statutory context." *Pharmaceutical Mfrs. Ass'n* v. *Kennedy*, 471 F. Supp. 1224, 1226 (D. Md. 1979). See *Hearst Radio, Inc.* v. *FCC, supra; In re FTC Corporate Patterns Report Litigation*, 1977-2 Trade Cas. (CCH) ¶ 61,544, at 72,143-72,145 (D. D.C. 1977), aff'd *sub nom. Appeal of FTC Line of Business Litigation*, 595 F.2d 685 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978).[12] See also *ITT* v. *Local 134, IBEW*, 419 U.S. 428, 441-448 (1975).

Second, the court of appeals begged the question by asserting that the term "agency action" must be defined in light of the recognized presumption in favor of judicial review under the Administrative Proce-

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[12] The activities held not to constitute "agency action" in the cited cases were issuance of a publication containing an alleged libel (*Hearst*); publication of nonproprietary information identifying generic drugs (*Pharmaceutical Mfrs.*); issuance of orders to file reports containing financial data (*Corporate Patterns Report*). For other cases holding that particular acts are not "agency action," see, *e.g.*, *National Ornament & Electric Light Christmas Ass'n* v. *CPSC*, 526 F.2d 1368, 1372-1373 (2d Cir. 1975) (sending volunteers to inspect stores' stock and warn of possibly unsafe lights); *Public Utilities Comm'n* v. *United States*, 356 F.2d 236 (9th Cir. 1966) (FCC conference with carrier); *Friends of Yosemite* v. *Frizzell*, 420 F. Supp. 390, 394 (N.D. Cal. 1976) (memorandum disapproving of proposed action); *People for Environmental Progress* v. *Leisz*, 373 F. Supp. 589 (C.D. Cal. 1974) (Forest Service program to spray weed killer).

dure Act. Obviously, any such presumption cannot apply until there has been "agency action" to review. See, *e.g.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

Finally, the court's unprecedented notion that "almost any act an agency takes can be 'agency action'" (J.A. 57) is plainly inconsistent with the language of the statute and would drastically alter its effect. No matter how "inclusive" the definition in Section 551(13) may be, it is clear from the words used that only actions having some dispositive effect on rights, privileges, duties or liabilities constitute judicially reviewable "agency actions." Unlike the examples of "agency action" provided in Section 551(13), issuance of an administrative complaint does not require the respondent to do or refrain from doing anything, save respond; it does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). See *United States* v. *Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309-310 (1927); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

A case illustrating this principle, even though the Court there applied it in a very different context from the present one, is *ITT* v. *Local 134, IBEW*, *supra*. That case involved a preliminary administrative determination by the National Labor Relations Board, pursuant to 29 U.S.C. 160(k), relating to con-

duct allegedly constituting an unfair labor practice (~~including~~ inducing employees to strike in hopes of forcing an employer to assign particular work to employees in a particular union, in violation of 29 U.S.C. 158(b)(4)(D)). The Court held that the NLRB's preliminary administrative determination was not an "order" (5 U.S.C. 551(6)) making the procedural safeguards of 5 U.S.C. 554 applicable to the proceedings leading up to that determination. The Court noted that "the Section 10k decision standing alone binds no one" (419 U.S. at 444, quoting *NLRB* v. *Plasterer's Union*, 404 U.S. 116, 126 (1971)) and thus is not itself the whole or a part of a "final disposition" within the meaning of the term "order" as defined in the APA.[13] Here, too, the Commission's issuance of the administrative complaint, embodying its determination that there is "reason to believe" that SOCAL violated the law is not a final disposition; on the contrary, it is merely a preliminary step that signals the commencement of an adjudicatory proceeding, and has no binding effect on the parties to that proceeding.

This distinction between preliminary determinations and conclusive dispositions was properly recognized by the District of Columbia Circuit in *Gifford-Hill & Co.* v. *FTC*, 523 F.2d 730, 732 (D.C. Cir. 1975). In that case the respondent in an FTC proceeding sought to nullify the administrative complaint

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[13] The Court rejected the contention that "an intermediate proceeding within an agency is necessarily a 'part' of a 'final order' * * *." 419 U.S. at 443.

on the ground that the Commission's determination to issue it had been made without compliance with the procedures required by the National Environmental Policy Act. The court concluded, *inter alia*, that the decision to institute an adjudicatory proceeding is not an "agency action" subject to judicial review under the APA.

The decision below—permitting respondent to file an action in the district court to prevent the adjudicative proceeding from going forward—threatens the integrity of the administrative process and is based on a distorted view of the Administrative Procedure Act's provisions for judicial review. The Administrative Procedure Act was not intended to give parties to an agency proceeding an opportunity to block that proceeding at its outset by seeking relief in the courts. On the contrary, the APA (specifically, 5 U.S.C. 704) preserves the rule established in this Court's prior cases that preliminary orders, such as orders setting matters for hearing, are not reviewable, either directly, or collaterally, through suits for injunctive or declaratory relief. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540 (1946); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). See *Attorney General's Manual on the Administrative Procedure Act* 103 (1947).

Under 5 U.S.C. 704 "a preliminary procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." Hence the Act confers a right on a person adversely affected or ag-

grieved by a final agency action to contest in a reviewing court, at the proper time (see point II, *infra*), any alleged prejudicial error in a preliminary or intermediate ruling by the agency. But this does not mean that such rulings are ever independently reviewable—even after the agency proceeding has concluded—at the behest of a person who has not been adversely affected by an "agency action" within the meaning of the APA's authorization of judicial review. In other words, there are steps in the administrative process that are not subject to judicial review under the APA at all, except to the extent that they may have contributed to an adverse agency disposition of the matter.

In short, the issuance of a complaint initiating an adjudicatory proceeding is not dispositive of anything because it has no "determinate consequences for the party to the proceeding." *ITT* v. *Local 134, IBEW*, *supra*, 419 U.S. at 443.[14] Accordingly, the Commission's issuance of the administrative complaint against SOCAL and the agency's prior deliberative

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[14] Of course, dispositive effects are not limited to formal agency action—they may occur in informal action (or inaction) that is the equivalent of a final disposition. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 318 (1979) (disclosure affecting property rights); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 442 F.2d 132, 137-142 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971) (agency's statement of policy having substantial effect on business held to be equivalent to rulemaking); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 863-864 (4th Cir. 1961) (agency proceedings unreasonably delayed). See also the district court's discussion in *In re FTC Corporate Patterns Report Litigation*, *supra*, 1977-2 Trade Cas. (CCH) at 72,144-72,145.

process do not constitute "agency action" and thus are not judicially reviewable under the APA, just as they are not subject to review in a suit for an injunction or a declaratory judgment.

B. If Issuance of An Administrative Complaint is "Agency Action," it is Within The Discretionary Function Exception of 5 U.S.C. 701(a)(2).

Even assuming that the decision to issue a complaint pursuant to Section 5(b) of the FTC Act is an "agency action," it nevertheless is an action "committed to agency discretion by law" and therefore is excepted from judicial review by 5 U.S.C. 701(a)(2). In holding otherwise, the court of appeals concluded that, for purposes of judicial review under 5 U.S.C. 701, there are two distinct aspects of "agency action" subsumed in the Commission's issuance of an administrative complaint—(1) the substantive "merits" of the "reason to believe" determination itself, and (2) whether the Commission in fact made a "reason to believe" determination that the law had been violated. As to the former, the court correctly held that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and [is] not reviewable in the district court under the APA" (J.A. 58). The court concluded as to the latter, however, that the "reason to believe" language in Section 5(b) imposes a substantive legal restriction on the Commission's discretion to issue complaints which must be satisfied before the Commission acts; that this restriction provides "law to apply" within the meaning of *Citizens*

to Preserve Overton Park v. *Volpe*, 401 U.S. 402, 410 (1971); and that the discretionary function exception of 5 U.S.C. 701(a)(2) is therefore inapplicable (J.A. 59).

This conclusion is erroneous. As the language, structure and legislative history of Section 5(b) demonstrate, for purposes of judicial review there is no meaningful distinction in the statute between the Commission's making a determination that it has "reason to believe" that unfair methods of competition or acts and practices have been or are being used by a respondent, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief. Moreover, the court of appeals ignored the settled principle that the initiation of administrative proceedings, like the initiation of criminal prosecutions, is a matter within the agency's discretion and is not subject to judicial review. Finally, the ruling below, if allowed to stand, would require the courts to probe the mental processes of the Commissioners, contrary to the principles established in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

1. *The Phrase "Reason to Believe" in Section 5(b) of the FTC Act Does Not Define a Judicially Enforceable Restriction on the Commission's Discretion to Initiate Cease-and-Desist Proceedings*

Although the discretionary function exception is admittedly "very narrow" (*Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 410), it places

an important limitation on judicial review by establishing a line of demarcation between those actions of executive and independent regulatory agencies that the courts may scrutinize under the legal standards set forth in 5 U.S.C. 701-706, and those that are subject exclusively to legislative oversight. The court of appeals disregarded this limitation. It avoided the discretionary function exception by treating the "reason to believe" language in Section 5(b) of the FTC Act as a substantive restriction that provides "law to apply" within the meaning of this Court's decision in *Overton Park, supra.* The court's mechanistic application of the language from *Overton Park,* without focusing on the nature of the particular administrative action involved, is inconsistent with this Court's analysis in that case (see 401 U.S. at 411-413) and with other decisions of this Court explaining when agency action involves unreviewable discretion. *E.g., Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979); *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Ass'n of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150, 157 (1970).

"Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins*, 397 U.S. 159, 165 (1970). See *Morris* v. *Gressette, supra*; *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Under these

cases, judicial review of agency action is foreclosed by 5 U.S.C. 701(a)(2) to the extent that the substantive statute reflects congressional intent to vest in the administrative agency unreviewable discretion to exercise particular functions. Determination of such an intent depends on the language, structure and legislative history of the substantive statute, and decisions under analogous statutes. See *Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 455. The court of appeals failed to undertake this necessary analysis.[15]

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[15] The discretionary function exception contained in Section 701 (a) (2) is essentially a codification of prior case law. Before the enactment of the Administrative Procedure Act, this Court engaged in the same type of analysis in determining whether Congress intended a particular agency action to fall within the agency's unreviewable discretion. See, *e.g., Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943).

Some courts have employed a more pragmatic analysis in determining whether a discretionary agency determination is the proper subject of judicial review. See, *e.g., Natural Resources Defense Council Inc.* v. *SEC,* 606 F.2d 1031, 1043-1044 (D.C. Cir. 1979); *Greater N.Y. Hosp. Ass'n* v. *Mathews,* 536 F.2d 494, 498 (2d Cir. 1976); *Hahn* v. *Gottlieb,* 430 F.2d 1243, 1249 (1st Cir. 1970). In the absence of a clear indication of congressional purpose, these courts have focused on three factors: (1) the appropriateness of the issues raised for review by the courts; (2) the impact of review on the effectiveness of the agency in carrying out its assigned role; and (3) the need for judicial supervision to safeguard the interests of the plaintiffs. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 371 (1968).

Consideration of these factors in the present context strongly supports nonreviewability. Review would undermine the effective and orderly conduct of enforcement proceedings

Section 5(b) provides that "[w]henever the Commission shall have reason to believe that any * * * corporation * * * is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve * * * a complaint stating its charges *in that respect* * * *" (emphasis added).

This language is a paradigm for the grant of discretion to an agency. It assigns to the Commission alone the choice of when, and on what grounds, to act. "Reason to believe" is one of two elements relating to exercise of this discretion. The other is the appearance, to the Commission, that a remedial proceeding would be in the public interest. The public interest determination has long been held unreviewable. *Hills Bros.* v. *FTC*, 9 F.2d 481 (9th Cir.), cert. denied, 270 U.S. 662 (1926); *Jewel Companies* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). Nothing on the face of the statute suggests that a different standard applies to the "reason to believe" element of the Commission's discretion. On the con-

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by inviting respondents to engage in disruptive and dilatory litigation of ancillary procedural issues in the courts; the courts would be unnecessarily burdened with premature consideration of cases that ultimately may not require judicial review because the Commission may terminate the administrative proceeding without entering a cease and desist order; and if a cease and desist order is entered, the respondent may challenge the validity of that order in the court of appeals, pursuant to 15 U.S.C. 45(c).

trary, as explained in *Hills Bros.*, *supra*, "[a]n examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe * * * is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case * * *." 9 F.2d at 483-484.

The analysis of the statute 54 years ago in *Hills Bros* correctly recognizes that the Commission's "reason to believe" and public interest determinations are embodied in the "complaint stating its charges in that respect" (15 U.S.C. 45(b)), that no other preliminary order or finding is necessary to institute an adjudicative proceeding, and that only the merits of the charges—not the preliminary determinations that led to their filing—may be litigated if and when a cease and desist order is eventually entered. Thus, the Commission determines that it has adequate "reason to believe" when, by affirmative vote, it concludes that the allegations in a proposed complaint are sufficient to warrant the initiation of an adjudicative proceeding; it then directs its Secretary to issue the complaint. See 16 C.F.R. 3.11. It follows that "reason to believe" is inextricably linked to the Commission's responsibility to decide what kinds of business conduct may be "unfair" within the meaning of the

statute. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310-314 (1934).

The court below recognized this linkage in holding that the merits of the Commission's reason to believe determination are not subject to judicial review (J.A. 58):

> Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. See, *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co.*, * * * 338 U.S. [632] (1950) at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term 'unfair' is the power to determine whether there is 'reason to believe' that a party is engaged in 'unfair' conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

Under the statute, there is no meaningful distinction between the factual allegations providing "reason to believe" and the question whether a "reason to believe" determination has in fact been made. If, as the court of appeals correctly held, the factual

basis for the reason to believe determination is unreviewable, it follows that the process by which the Commission reaches that determination is also insulated from judicial review.

The legislative history of Section 5(b) supports the view that Congress intended to place the Commission's issuance of an administrative complaint beyond the power of the courts to review. The "reason to believe" language was inserted into 15 U.S.C. 45 by the Senate Committee on Interstate Commerce. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). The committee report did not discuss the reason to believe standard as such. But it stressed the need for "wide discretion" in the conduct of investigations to avoid hampering administration of the Act, noting that "[t]o almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry" (*id.* at 12).[16]

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[16] The references in the congressional debates to the "reason to believe" standard support our position that the issuance of a complaint rests entirely in the Commission's discretion and hence is not subject to review. For example, a Senate opponent of the bill contended that the proposed Commission would be able to issue a complaint whenever a complainant "can satisfy [the Commission] or arouse their suspicion to the point that the Commission think they have reason to believe * * *." 51 Cong. Rec. 12624 (1914) (remarks of Sen. Brandegee). Another opponent of the bill observed during the debates that a complaint would be issued by the Commission "if it should be found that there was a likelihood of successful prosecutions." *Id.* at 16281 (remarks of Rep. Volstead). He regarded the issuance of the complaint

The statutory language, structure, and history of Section 5(b) together reflect an unambiguous intent to confer the widest discretion on the Commission to initiate complaints, because the Commission alone is empowered to determine in the first instance whether a method of competition or an act or practice is "unfair." The court of appeals' contrary conclusion that the making of a "reason to believe" determination is subject to statutory constraints and, hence, is judicially reviewable (J.A. 59) purports to rest upon its decision in *Hunt Foods and Industries, Inc.* v. *FTC*, 286 F.2d 803, 806 (9th Cir.), cert. denied, 365 U.S. 877 (1961).

Hunt Foods correctly held that the Commission's responsibility to ascertain the facts before issuing a complaint—reflected in the "reason to believe" language of Section 5(b) of the FTC Act and Section 11 of the Clayton Act, 15 U.S.C. 21—sustained its au-

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as "equivalent to the bringing of a law suit" (*ibid.*). This view of the Commission's reason to believe determination was underscored by the remarks of Senator Sutherland: "when the commission have reason to believe that an unfair method of competition is being practiced, they shall bring the parties before them for an investigation" (*id.* at 12652).

Contemporaneous construction also reflects an understanding that the Commission's initiation of proceedings is not subject to review. A commentator reviewing the first decade of the Act's administration noted that no procedure existed to put in issue the sufficiency of the Commission's reasons to believe that a violation had occurred. G. Henderson, *The Federal Trade Commission* 49-50 (1924).

thority to issue investigational subpoenas prior to issuing a complaint.[17] Although the Commission's preliminary ascertainment of the facts was described by the court as a "duty" (286 F.2d at 806), that characterization does not create a judicially enforceable restriction on the Commission's power to issue complaints. For the same "duty" is preliminary to the initiation of every proceeding by the government—administrative, civil or criminal—

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[17] *Hunt Foods* involved a subpoena issued by the Commission in aid of an investigation into possible violations of Section 5 of the FTC Act and Sections 2(a) and (d) of the Clayton Act, 15 U.S.C. 13(a) and (d). The respondent claimed that the Commission could not gather information by subpoena until it had issued a complaint. The court of appeals disagreed. It noted that both Section 11 of the Clayton Act and Section 5(b) of the FTC Act provide that complaints may be filed whenever the Commission shall have "reason to believe" that a violation has occurred. It then reasoned that "[t]he Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts" (286 F.2d at 806). Since the investigational subpoena was in aid of this function, the court held that it had been properly issued under 15 U.S.C. 49, relating to subpoenas, and 15 U.S.C. 43 and 46, relating to the Commission's power to conduct investigations. The rationale of *Hunt Foods* that "reason to believe" depends upon ascertainment of the relevant facts comports with our position that "reason to believe" is shown by the factual allegations contained in the administrative complaint, and that no separate inquiry may be made into the Commission's deliberative process.

charging a violation of law or other misconduct, that may eventually result in imposition of a sanction. The duty to ascertain facts before initiating administrative proceedings is thus analogous to a grand jury's investigation prior to making a determination of probable cause. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Like a grand jury's finding of probable cause, an agency's reason to believe determination has no independent legal significance apart from the supporting factual allegations in the complaint, which must be established in the ensuing adjudicative proceeding. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 147 (1967).

In *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, this Court held that an administrative "probable cause" determination is not judicially reviewable, even when the immediate consequence of the determination is the seizure of property. The Court recognized that "[t]he harm to property and business can * * * be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." *Id.* at 599. Cf. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 146-148; *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938).

Were the rule otherwise, numerous administrative,[18] civil[19] and criminal[20] proceedings would be delayed while the courts went behind facially valid complaints to determine whether the charging au-

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[18] The "reason to believe" standard applies not only to Commission administrative complaints issued pursuant to Section 5 of the FTC Act and Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), but also to its attempts to obtain injunctive relief (15 U.S.C. 53(b)) or criminal penalties (15 U.S.C. 56(b)), and to its enforcement of other statutes (15 U.S.C. 68e(b), 68h (Wool Products Labeling Act); 15 U.S.C. 69f (Fur Products Labeling Act); 15 U.S.C. 70a, 70f, 70i(b) (Textile Fiber Products Identification Act).

Many other regulatory statutes provide that complaints shall be issued if the agency has "reason to believe" violations of law are occuring. *E.g.*, 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. 193, 292 (Secretary of Agriculture); 15 U.S.C. 21(b) (enforcement of the Clayton Act by ICC, FCC, CAB, Federal Reserve Board, and FTC); 15 U.S.C. 77j(b) (SEC's authority to issue order suspending use of prospectus and institute hearings); 15 U.S.C. 1195(a) (Consumer Product Safety Commission's authority to seek injunction for violation of Flammable Fabrics Act); 42 U.S.C. 1973aa-2, 5309(c) (Attorney General's authority to bring certain civil rights enforcement actions); 42 U.S.C. 300h-3(c), 300j(e)(3) (EPA administrator's authority to seek TRO or injunction). See also 15 U.S.C. 77t(b), 78u(d) (authorizing the SEC to initiate court proceedings whenever it "appear[s] to the Commission" that violations of law are occurring).

[19] Cf. Fed. R. Civ. P. 11 (signing of pleading by attorney certifying that there is "good ground to support it").

[20] Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence).

thority in fact had made a determination that it had sufficient evidence of a violation to initiate a proceeding.[21]

2. *The Issuance of an Administrative Complaint is An Exercise of Unreviewable Prosecutorial Discretion*

Discretion to institute administrative enforcement proceedings is similar to the discretion exercised by a prosecutor in bringing criminal charges. Accordingly, many of the reasons that militate against judicial review of prosecutorial discretion in the criminal area also apply to judicial review of decisions of agencies to issue administrative complaints. In the criminal area, it is settled that "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).[22] The decision as to when to bring criminal charges is also one within the prosecutor's discretion. See *United States* v. *Lovasco*, 431 U.S. 783 (1977).

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[21] For this and other reasons, the general counsels of five agencies have expressed concern to the Solicitor General about the harmful implications of the court of appeals' decision in this case. See Pet. App. 32a-43a.

[22] That discretion, of course is subject to constitutional limits on its exercise. *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 365. Thus a claim that a respondent in an administrative proceeding was singled out on the basis of an unjustifiable standard such as race or religion would serve as a proper basis for seeking judicial review of a final cease and desist order.

Administrative agencies have similarly broad discretion in initiating adjudicative proceedings.[23] As Judge Carter observed below (J.A. 62-63):

> * * * [J]udicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S. App. D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's decision is against prosecution (*e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmilier* v. *SEC*, 160 U.S. App. D.C. 375, 379, 492 F.2d 641, 645 (1974)).
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> In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (NLRB General Counsel has un-

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[23] In *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958), this Court recognized that "the [Federal Trade] Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

reviewable discretion to decide whether or not to issue an unfair labor practice complaint.[24]); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, *supra* (ICC has unreviewable discretion whether to suspend or investigate a railroad tariff); *Morris* v. *Gresette*, *supra* (Attorney General has unreviewable discretion whether to object to a state's change in election laws under the Voting Rights Act). The Commission's exercise of "prosecutorial" discretion in initiating adjudicative proceedings is equally as broad.[25]

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[24] This unreviewable discretion is confirmed in the legislative history of the APA. Section 10(c) of that Act, now 5 U.S.C. 704, provided that "every agency action made reviewable by statute and every final agency action for which there is no adequate remedy in Court shall be subject to judicial review." It was objected "that this section read in the light of the definition of agency action in subsection (g) of section 2 would enable courts to review the failure of an agency to institute proceedings in labor cases. The point is made that out of the numerous complaints and requests received the responsible agency must have discretion to choose what shall be set down for proceedings. The answer however, is that the introductory clause of section 10 expressly exempts agency action * * * committed by law to agency discretion." *Administrative Procedure Act, Legislative History*, *supra*, S. Doc. No. 248 at 38; see also *id.* at 229-230. See *Attorney General's Manual on the Administrative Procedure Act* 95, 136 (1947).

[25] Respondent asserts (Br. in Opp. 14-15 n.10) that in both *Southern Railway* and *Morris* v. *Gressette*, other avenues of judicial review were available to the aggrieved parties. But it was Congress, not the courts, that created those alternative avenues for review. Surely respondent does not suggest that the courts are obligated to fashion new forms of relief to accommodate every party whose claims would otherwise be unreviewable, even where it appeared that Congress did not intend to permit such review.

A comparison of this case with *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), underscores our contention that the issuance of the Commission's complaint is an exercise of prosecutorial discretion beyond the power of the courts to review. In *Bachowski* the Court held that a decision by the Secretary of Labor not to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959 (L-MRDA) to set aside an allegedly invalid union election was subject to limited judicial review at the behest of parties protected by that Act. This Court (421 U.S. at 567 n. 7) adopted that portion of the Third Circuit's opinion (*Bachowski* v. *Brennan*, 502 F.2d 79, 86-88 (1974)) which rejected the Secretary's contention that his decision was an unreviewable exercise of prosecutorial discretion.

The Third Circuit in *Bachowski* held that "the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights." 502 F.2d at 87. The Court noted that "in seeking to remedy violations of the [L-MRDA] the Secretary acts not only for the benefit of the country as a whole, but also on behalf of those individuals whose rights have been infringed. To grant the Secretary absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy." 502 F.2d at 87-88 (footnote omitted). The Third Circuit concluded that the Sec-

retary's reviewable authority under the L-MRDA was distinguishable from the unreviewable authority of the General Counsel of the National Labor Relations Board to refuse to institute an unfair labor practice complaint, because under Section 10(c) of the National Labor Relations Act, " '[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies.' " 502 F.2d at 87 n. 11, quoting *Vaca* v. *Sipes*, 386 U.S. 171, 182 n. 8 (1967).

Similarly, the principal concern of the Federal Trade Commission in initiating adjudicative proceedings pursuant to Section 5(b) of the FTC Act is not the vindication of private rights but whether particular unfair acts or practices have been harmful to the public interest. In *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929), the Court confirmed that "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." Thus, it is clear that under *Klesner* complaining consumers and competitors disappointed by the Commission's failure to initiate an adjudicative proceeding have no right to judicial review into whether the Commission made an independent "reason to believe" determination with respect to their grievance. There is no reason for a different standard when a complaint is issued, rather than refused.[26]

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[26] In *Klesner* the Court declined to enforce the Commission's cease and desist order because it concluded that the record developed at the adjudicative proceeding showed that

Respondent relies (Br. in Opp. 9) upon language in *Schilling* v. *Rogers*, 363 U.S. 666 (1960)[27] that suggests that judicial review may be available where "it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers * * *." *Id.* at 676-677, citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) and *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Neither *Accardi* nor *Leedom* involved the reviewability of a decision to initiate administrative proceedings.

In *Accardi*, an alien alleged that his name was included in a list of "unsavory characters" whom the Attorney General planned to deport and that the list was circulated to the members of the Board of Immigration Appeals prior to their decision denying the alien discretionary relief from deportation. The Court observed that the facts as alleged were sufficient to warrant judicial review of the Appeal

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the controversy was private in character. 280 U.S. at 30. Nothing in *Klesner* suggests that a cease and desist order should be set aside if the administrative proceeding develops evidence of violations contrary to the public interest that were not known when the complaint was filed. By the same token, we submit that a cease and desist order supported by sufficient evidence of a violation is not subject to challenge on the ground that the Commission failed to make a "reason to believe" determination at the outset of the proceeding.

[27] In *Schilling*, the Court concluded, after examining the terms and history of the Trading with the Enemy Act, that the refusal of the alien property custodian to return vested property was not reviewable despite a "congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive * * *." 363 U.S. at 675.

Board's failure to exercise its discretion "where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding." 347 U.S. at 267. Here, of course, in contrast, Senator Jackson, who allegedly communicated with the Commission prior to the filing of the complaint (J.A. 7), was a single member of an entirely separate branch of government. Respondent has never even alleged that Senator Jackson expressed to the Commission any opinion regarding the issuance of an administrative complaint. Moreover, absent judicial review, the Board's failure to act in *Accardi* would have resulted in immediate deportation of the alien. In contrast, the Commission's "reason to believe" determination has no legal consequence beyond the institution of administrative proceedings. Compare *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 598.

Leedom involved a decision by the National Labor Relations Board to include professional employees in a collective bargaining unit without first determining, as required by statute, whether a majority of the professional employees would vote for inclusion in such a unit. The Court held that the Board's violation of an express statutory prohibition deprived the professional employees of a right provided by Congress, and that judicial review was available to prevent deprivation of that private right. The Court, however, was careful to distinguish between express statutory prohibitions, and affirmative declarations of duty.

> While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable, in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. * * * If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose * * *.

358 U.S. at 189, quoting *Texas & New Orleans R.R. Co.* v. *B'hd. of Railway & Steamship Clerks*, 281 U.S. 548, 568 (1930). Unlike the statute involved in *Leedom*, Section 5(b) of the FTC Act, authorizing the Commission to issue administrative complaints, is, at most, an "affirmative declaration of duty" directed at vindicating the public interest (see *FTC* v. *Klesner*, *supra*), and does not impose any enforceable restriction on the Commission's exercise of authority.[28]

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[28] Nor can respondent draw support from Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b) (Br. in Opp. 13). That Section provides that the Commission may seek a preliminary injunction in the district court "[w]henever the Commission has reason to believe" (1) that a violation of any provision of law enforced by the Commission is occurring or is about to occur; and (2) that it would be in the public interest to enjoin the alleged violation "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review * * *." The district court may grant such an injunction only "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest * * *."

No court has ever held that the Commission's decision to seek a preliminary injunction is reviewable on the ground that the Commission failed to make a "reason to believe"

Respondent contends (Br. in Opp. 15) that if the Commission has unreviewable discretion to issue a complaint, it might do so solely for political reasons even if it had no basis whatever for believing that a respondent had violated the law. This is not a proper

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determination that a violation was occurring or was about to occur. Instead, in determining whether to grant relief under Section 13(b), the courts have focused on whether the Commission has met its burden of showing the likelihood of ultimate success on the merits. See *FTC* v. *National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979). Obviously, if the Commission fails to support the allegations reflecting its "reason to believe," it has not shown that success on the merits is likely, and the district court must therefore deny the injunction. See *FTC* v. *British Oxygen Co.*, 529 F.2d 196, 199 (3d Cir. 1976) (en banc). Even where an injunction has been denied, however, Section 13(b) does not authorize the district court either to review the Commission's subsequent determination to issue an administrative complaint, or to enjoin the ensuing administrative proceeding.

Respondent similarly errs in asserting (Br. in Opp. 14) that the "reason to believe" provision in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, is analogous to Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), recodified by Pub. L. No. 95-473, 92 Stat. 1449, as 49 U.S.C. 1170(b). Section 13(1) requires the Interstate Commerce Commission to provide a forum in which shippers may assert damages claims against carriers for violations of the Act. See, *e.g.*, *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). In the alternative, shippers may elect to pursue remedies against carriers directly in the courts. See 49 U.S.C. 8, 9. Section 5 of the Federal Trade Commission Act, however, does not create such a private remedy. See *FTC* v. *Klesner*, *supra*, 280 U.S. at 25-26; *Alfred Dunhill Ltd.* v. *Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). Under respondent's analogy, Section 5 would permit judicial review of the Commission's decision not to issue an administrative complaint. But *Klesner* demonstrates that review is unavailable in those circumstances.

basis for inferring a congressional intent to permit judicial review of the prosecutorial decisions of the Commissioners who, it must be assumed, "will perform faithfully [their] statutory responsibilities." *Morris* v. *Grossette*, *supra*, 432 U.S. at 506 n.23. If the Commission fails to support the allegations reflecting the "reasons to believe" set forth in its complaint, then it must terminate the proceeding without entering any order against respondent, or bear the risk that a reviewing court "will reverse its final order, [and] condemn its proceeding as so much waste motion * * *." *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970).

3. *Review of the Making of a "Reason to Believe" Determination Would Require an Unjustified Inquiry Into the Commissioners' Mental Processes*

Judicial review of whether the Commission in fact made a reason to believe determination would, as Judge Carter pointed out (J.A. 63), require the courts to go behind a certified and facially valid complaint in order to inquire into the mental processes of the Commissioners. As this Court observed in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), "[j]ust as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected."

The collegial nature of the decision-making process in the Commission and in similar agencies exacerbates the impropriety of any inquiry into that process. In this case, the district court would have to assess the deliberations of five individuals, only one of whom is currently a member of the Com-

mission,[29] to determine, among other things, whether and to what extent their collective determinations were influenced by congressional pressure. The very nature of this inquiry strongly indicates that whether the Commission "in fact" made a reason to believe determination is a matter that Congress committed to agency discretion and is consequently unreviewable under 5 U.S.C. 701(a)(2).

The presumption of regularity that precludes probing of the decision-making process is especially weighty "where there are administrative findings that were made at the same time as the decision." *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 420. In such a case, "there must be a strong showing of bad faith or improper behavior before such inquiry may be made." *Ibid.* See *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). Here, the allegations in the administrative complaint constitute the Commission's "findings" that there is "reason to believe" that SOCAL and the other respondents in the administrative proceeding violated the law. Respondent's allegations of bad faith are plainly insufficient to overcome the presumption of regularity.

Respondent's district court complaint alleges that the Commission's staff did not engage in extensive precomplaint investigation directly involving SOCAL (J.A. 6-8); that before the administrative complaint was issued Senator Jackson requested the Commission to prepare a report regarding the relationship

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[29] At the time of the administrative complaint only present Commissioner Dixon was a member of the Commission.

between the structure of the petroleum industry and the shortage of petroleum products (J.A. 7); that, in transmitting the report to Congress, the Commission's Chairman indicated that the report had not been evaluated or approved by the Commission and requested that the report not be disclosed to the public (J.A. 8-9); and that 12 days after the report was transmitted to Congress and five days after it was made public the Commission filed its complaint (J.A. 9-10). Assuming the truth of these allegations, they do not establish that the complaint was issued without a "reason to believe" determination.

Respondent does not allege facts showing that the Commission issued its complaint under compulsion or duress. Even if the Commission did receive requests from individual members of Congress that it issue an administrative complaint, there is nothing improper in that. Requests that administrative agencies take actions of various kinds within their discretion are very much a part of the political-administrative process and are entirely legitimate and consistent with the public interest. See *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 610-612 (3d Cir. 1977). If members of Congress (or, indeed, any other persons), consider that it is in the public interest for the Commission to initiate a formal proceeding, they have a right to communicate their thoughts, and the Commission has a right to receive and consider such communications.[30] Respondent has not even alleged

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[30] As the district court remarked (J.A. 51):

> I think the function of the legislators, state and federal, is at least in part to make their views known to ad-

that such communications were made in this case; its allegations are purely circumstantial in character. However, if the mere chronological coincidence of congressional inquiries and Commission investigations may subject initiation of Commission proceedings to collateral challenge in the district courts, then every major agency proceeding addressing matters of current and substantial public interest is likely to be threatened with disruption at the outset by claims of "political" influence.[31]

Nor is there any substance to respondent's contention that the Commissioners did not have sufficient time to evaluate the staff report and make a "reason to believe" determination prior to authorizing the issuance of the administrative complaint. In *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974), the court (per Friendly, J.) rejected a similar contention that a newly-appointed official had not "exercised his own mental processes at all" (*id.* at 1144) in issuing a rule, where there had been a formal recital that the official had considered the voluminous record. Addressing a contention that it was virtually impossible for the official personally to have considered the massive record in the brief period between taking office

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ministrative agencies and those who are responsible for the mechanics of government.

[31] This case is not comparable to *Pillsbury Co.* v. *FTC*, 354 F.2d 952, 956, 964 (5th Cir. 1966), where the court vacated the Commission's divestiture order on the ground of "interference" by members of Congress in the Commission's decision on the merits "in its *judicial* function" (emphasis in original).

and issuing the rule, the court held that such allegations were not sufficient to overcome the presumption of regularity that attached to the official's actions.[32] Here, too, respondent's conclusory allegations do not overcome the presumption of regularity in view of the formal recital in the administrative complaint that the Commission had found "reason to believe" that respondent had violated the law.[33]

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[32] Cf. *Montrose Chemical Corp. of California* v. *Train*, 491 F.2d 63 (D.C. Cir. 1974) (denying FOIA request where disclosure would open up agency's deliberative process to public scrutiny).

[33] Although we disagree with the decisions in *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970) and *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C. Cir. 1965), cited by respondent (Br. in Opp. 21), those cases are inapposite in any event. In *Jewel Companies*, the question was whether one Commissioner had correctly concluded that he had no discretion to vote against issuance of a complaint on public interest grounds if "reason to believe" otherwise existed. In *Elmo Division*, the question was whether the district court had jurisdiction to entertain a suit by a party to a prior consent decree to enforce procedural rights that the Commission had granted in its prior decree. See *Action on Safety and Health* v. *FTC*, 498 F.2d 757, 762-763 n.16 (D.C. Cir. 1974). The preliminary issues held reviewable in those cases thus involved pure questions of law as to which no presumption of regularity applies, and, unlike this case, did not require any inquiry into either the thought-processes of the individual Commissioners, or the manner in which the Commission as a body exercised its responsibility to determine whether there was "reason to believe" that a violation occurred.

II. THE COMMISSION'S ISSUANCE OF AN ADMINISTRATIVE COMPLAINT IS NOT "FINAL AGENCY ACTION" SUBJECT TO IMMEDIATE JUDICIAL REVIEW DURING THE PENDENCY OF THE ENSUING ADJUDICATIVE PROCEEDING

The court of appeals further erred in holding that the Commission's issuance of an administrative complaint is "*final* agency action" as to respondent within the meaning of 5 U.S.C. 704. Even if it is assumed that the Commission's decision to initiate a proceeding by issuing a complaint is ultimately subject to judicial review, the court of appeals has disregarded both the limitation of judicial review in Section 704 to "final agency action," and the decisions of this Court upon which Section 704 is based, expressing the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Moreover, by permitting immediate district court review, the court has departed from the statutory scheme established by Congress for review of Commission actions.

Section 704 of the APA specifies that "[a] preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." The Commission's issuance of the administrative complaint in this case and its making of a "reason to believe" determination are plainly only preliminary steps in the

adjudicative process contemplated by 15 U.S.C. 45 (b).[34]

The court of appeals determined that the Commission's action was "final" for purposes of permitting interlocutory review,[35] reasoning (J.A. 61)

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[34] Under Section 5(b) respondents are entitled to an opportunity for a hearing on the record to "show cause why an order should not be entered by the Commission." 15 U.S.C. 45(b). Pursuant to 5 U.S.C. 554 and the Commission's Rules (16 C.F.R. 3.41), this hearing is conducted before an administrative law judge who renders an initial decision. The burden of proving that the respondent has used or is using unfair methods or deceptive acts and practices is on counsel supporting the complaint. 5 U.S.C. 556(d). Respondents and complaint counsel have the right to appeal adverse effects of the initial decision to the full Commission (5 U.S.C. 557; 16 C.F.R. 3.52), which may enter a final order either dismissing the complaint or directing the respondent to cease and desist from any violations found. In the latter event, the respondent may petition the court of appeals for review. The Commission's order does not become effective—and no penalty may be imposed for violation thereof—until judicial review is completed, or foregone. 15 U.S.C. 45(c), (g)-(j), (*l*).

[35] Relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967), the court ruled (J.A. 60-61) that "[t]he finality element in Section 704 should be interpreted in a 'pragmatic' way." *Abbott Laboratories* involved the formal promulgation of an agency regulation that was "quite clearly definitive" and made "effective upon publication." 387 U.S. at 151. Moreover, all parties agreed that the issue raised was "a purely legal one," and "no claim [was] made * * * that further administrative proceedings [were] contemplated." *Id.* at 149. Here, on the other hand, the making of a "reason to believe" determination prior to issuance of an administrative complaint is neither a "definitive" nor an "effective" regulatory act; indeed, the only consequence of such an act is the conduct of formal administrative proceed-

that respondent had effectively exhausted its remedies when it unsuccessfully moved the Commission to withdraw its complaint; that respondent's challenge to issuance of the complaint would become moot if it prevailed before the Commission; that the Commission's rejection of respondent's claim would foreclose respondent from developing relevant facts for purposes of judicial review; and that on review of any decision by the Commission adverse to respondent the Court would not consider alleged defects in the filing of a complaint.

None of this reasoning is persuasive. First, the requirement that administrative remedies be exhausted presumes that judicial review must await "final" agency action, and is not satisfied simply by presenting the agency with a motion for termination of the proceeding at a preliminary stage. Such a motion may raise an *issue*, but if it is denied, the agency's disposition of the motion simply constitutes "[a] preliminary procedural or intermediate agency * * * ruling not directly reviewable [that becomes] * * * subject to review on the review of the final agency action." 5 U.S.C. 704. Even though respondent may have no other means of seeking relief before the Commission with respect to whether a "reason to believe" determination was in fact made, it must await final agency action adversely affecting it be-

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ings. In further contrast to *Abbott Laboratories*, the issue raised in this case is not purely legal in character, but requires the courts to conduct a factual inquiry by going behind a facially valid complaint to examine the mental processes of the Commissioners.

fore it may seek judicial review. The mere conduct of adjudicative proceedings on charges that may never be sustained cannot be deemed "final" action, and, accordingly, courts will not enjoin conduct of such proceedings on a bare claim that the agency has no statutory or constitutional authority to proceed. See, *e.g.*, *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), rev'g 156 F.2d 821 (D.C. Cir. 1946); *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 543-544 (1946); *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 221-222 (1938); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-385 (1938).[36]

Moreover, the court of appeals ignored the principle that "[w]ithout a clear showing of irreparable injury, * * * failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24 (1974). No such injury results from the requirement that a party respond to an administrative complaint, even though litigation ex-

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[36] As Judge Leventhal observed in *Ass'n of National Advertisers Inc.* v. *FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979), slip op. 8 (concurring opinion), "[o]nly in rare instances is a non-final agency action reviewed in the teeth of a general denial of jurisdiction. In *Leedom* v. *Kyne*, 358 U.S. 184 (1958) the Court was willing to by-pass a general jurisdictional barrier when an agency clearly violated an express statutory prohibition. But the *Leedom* exception 'is a narrow one' [*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)]. It is reserved for the kind of clear case that identified the original doctrine of mandamus." As explained above (pages [illegible], *supra*), this case is plainly distinguishable from *Leedom*. (41-4

penses may be substantial and unrecoverable and the conduct of litigation burdensome and inconvenient. "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc.* v. *Public Service Comm'n, supra,* 304 U.S. at 222; *Renegotiation Board* v. *Bannercraft Co., supra,* 415 U.S. at 24; *Myers* v. *Bethelehem Ship Building Corp., supra,* 303 U.S. at 51-52.[37]

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[37] The court of appeals incorrectly relied (J.A. 61) on *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n.11 (1976), in support of its "irreparable injury" ruling. That case involved a constitutional objection, wholly collateral to a substantive claim of entitlement to continued payment of Social Security disability benefits. The applicant, who claimed that the lack of a hearing before termination of such benefits denied him due process, had not pursued to final determination by the Secretary his objections to the procedures, which were contained in binding regulations. Instead, unlike respondent here, he sought review under the prescribed statutory procedure (42 U.S.C. 405(g)). This Court treated the initial denial of his claim as a final decision. It ruled that the applicant's "claim to a predeprivation hearing * * * rest[ed] on the proposition that full relief cannot be obtained at a postdeprivation hearing" because loss of disability benefits for a period of time "would damage him in a way not recompensable through retroactive payments," due to his physical condition and dependency. 424 U.S. at 331. No comparable claim of injury results from the Commission's "reason to believe" determination, which simply subjects respondent to litigation. In further contrast to *Eldridge,* respondent's claims are not of constitutional magnitude. Moreover, as shown in the text (pages 55-57, *infra*), if the "reason to believe" question is reviewable at all, the court of appeals may consider it on review of the final order. Thus, unlike *Eldridge,* this is not a case in which "crucial collateral claims [will] be lost and potentially irreparable injury will be suffered" (424 U.S. at 331 n.11).

The court's second ground—that respondent is entitled to immediate review in the district court because its challenge to issuance of the complaint may become moot if respondent prevails in the administrative proceeding—ignores the fact that one of the basic purposes of the exhaustion doctrine is the avoidance of unnecessary judicial consideration of preliminary or procedural rulings entered in the course of an administrative proceeding. See *McGee* v. *United States*, 402 U.S. 479, 484 (1971); *Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972). Indeed, the court of appeals' reliance on possible mootness would read the requirement for exhaustion of remedies out of the law, since the same analysis would necessarily apply to every adverse interlocutory ruling made in the course of any administrative proceeding that might terminate in favor of the respondent.

The issuance of an administrative complaint and the agency's denial of a motion to dismiss the complaint are preliminary determinations that do not become "final" merely because they may become moot. The decision below is based on a misconception of the purpose and meaning of the "no other adequate remedy" provision of 5 U.S.C. 704. As Judge Carter concluded (J.A. 65), that provision "was not intended to convert preliminary agency decisions that might otherwise become moot into final agency actions in order to afford judicial review. Rather it is designed to exempt 'final agency action' from judicial review under the APA if there is an adequate alternative legal remedy." See, *e.g.*, *Warner* v. *Cox*,

487 F.2d 1301, 1304 (5th Cir. 1974) (Tucker Act considered an adequate remedy). If the agency decision is, as here, not effectively "final," the question of whether or not there is an "adequate" alternative judicial remedy need not even be reached.

Third, review of respondent's claim in the court of appeals following the entry of a cease and desist order would not be inadequate on the court's theory that the Commission has denied respondent an opportunity to make a record on its claim that the complaint was improperly issued. If the agency record is inadequate on any reviewable issue, the court of appeals may either remand the proceeding to the Commission for supplementation of the record, or modify or set aside the Commission's order, with or without remand, as it deems appropriate. 15 U.S.C. 45(c); 5 U.S.C. 705; see *Dolcin Corp.* v. *FTC*, 219 F.2d 742, 750-752 (D.C. Cir.), cert. denied, 348 U.S. 981 (1955).

The court's final reason in favor of interlocutory review—that an appellate court reviewing a final order would have no occasion to reach respondent's claim that the complaint was unlawfully issued—is also unsound. The mere possibility that an issue might not be reviewable at a later stage is not sufficient reason to justify interlocutory review. See, *e.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, *supra*, 333 U.S. at 113-114. Moreover, if the court of appeals was correct in holding that the "reason to believe" standard is a judicially

enforceable restriction on the Commission's discretion, then the Commission's application of that standard, like any other preliminary ruling preserved in the administrative proceeding, may be reviewed in connection with any cease and desist order ultimately issued by the Commission. 5 U.S.C. 704; 15 U.S.C. 45(c).

The court of appeals nevertheless may have believed, although it is unclear, that the preliminary determination would become irrelevant if the Commission ultimately found substantial evidence supporting the complaint.[38] Two theories in support of such an approach might be advanced. Under one, if the Commission subsequently found substantial evidence, then the defect in issuing the complaint might cease to be "prejudicial" error under 5 U.S.C. 706.[39] Under the other, the preliminary determination to issue the complaint might be viewed as "merging" into the final determination on the merits. Cf. *Hills Bros.* v. *FTC*, *supra*, 9 F.2d at 484. These theories

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[38] The court stated simply that "an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint." (J.A. 61) It cited *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367-368 (1967), but that case involved only review of a final cease-and-desist order, not a challenge to a determination preliminary to issuance of an administrative complaint.

[39] The last sentence of that section requires that in making determinations under 5 U.S.C. 706(2)(A)-(F) "due account shall be taken of the rule of prejudicial error."

further demonstrate that the court's premise of reviewability is erroneous. In any event, if the "reason to believe" determination is reviewable at all, there is no statutory restriction on the authority of the court of appeals, as the forum for "the special statutory review proceeding relevant to the subject matter" (5 U.S.C. 703; see 15 U.S.C. 45(c)), to review whether the Commission's issuance of the administrative complaint without making a preliminary "reason to believe" determination was "without observance of procedure required by law" (5 U.S.C. 706(2)(D)).

The decision of the court of appeals permitting interlocutory district court review of respondent's claim is contrary to the particular method provided by Congress in 15 U.S.C. 45(c) for judicial review of the Commission's orders. This procedure is exclusive, for where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory demand of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965); *City of Tacoma* v. *Tax Payers of Tacoma*, 357 U.S. 320, 336 (1958). Moreover, Congress specified in the Administrative Procedure Act (5 U.S.C. 703) that the proper form of judicial review is "the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless that remedy is inadequate. The deci-

sion so to limit judicial review reflects a policy choice by Congress designed to forestall piecemeal litigation and disruption of the administrative process. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry*, *supra*, 339 U.S. at 600-602; *FPC* v. *Metropolitan Edison Co.*, *supra*, 304 U.S. at 383-384, 385; *Myers* v. *Bethlehem Ship Building Corp.*, *supra*.

55- The court of appeals disregarded its duty to respect that choice. We have shown (pages 57-58, *supra*) that if respondent's claim concerning the making of a "reason to believe" determination is reviewable to all, 15 U.S.C. 45(c) provides an adequate remedy to review that claim. There is thus no need to bifurcate review between the court of appeals and the district court.

The scheme of the FTC Act gives the district courts no role to play in review of Commission actions that may lead to issuance of final orders terminating proceedings or requiring corporations to cease and desist from unfair methods of competition and unfair or deceptive acts and practices. Congress has vested that jurisdiction in the courts of appeals alone. Thus, even assuming that Commission determinations preliminary to issuance of a complaint are reviewable, "the jurisdiction would not lie in the district court, but in the court of appeals, which is where Congress has lodged general jurisdiction to review FTC orders * * *." *Ass'n of National Advertisers, Inc.* v. *FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979), slip op. 10

(Leventhal, J., concurring opinion).[40] See *Frito-Lay, Inc.* v. *FTC*, 380 F.2d 8 (5th Cir. 1967); cf. *Atlantic Richfield Co.* v. *FTC*, 398 Supp. 1, 10 (S. D. Tex. 1975), aff'd, 546 F.2d 646 (5th Cir. 1977). See also *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980).

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[40] At most, interlocutory jurisdiction to review non-final actions could be exercised under the All Writs Act, 28 U.S.C. 1651. But "[to] the extent that the All Writs Act has been used in connection with FTC matters, it is the court of appeals that has been found to have the power to grant relief. *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966)." *Ass'n of National Advertisers, Inc.* v. *FTC*, *supra*, Slip op. 10 (Leventhal, J., concurring)

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General
Department of Justice

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

JOANNE L. LEVINE
MARK W. HAASE
Attorneys
Federal Trade Commission

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OF THE

United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

GEORGE A. SEARS
Counsel of Record
RICHARD W. ODGERS
C. DOUGLAS FLOYD
225 Bush Street
Mailing Address:
P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Attorneys for Respondent

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address:
P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

THE QUESTION PRESENTED

Where the statute creating the Federal Trade Commission authorizes the Commission to issue a complaint only when it makes a determination that there is reason to believe that the Federal Trade Commission Act has been violated, does a complaint for declaratory relief filed in district court by a respondent in a Commission proceeding, alleging (a) that the Commission in issuing its complaint made no determination that it had reason to believe that the respondent had violated the law and (b) that the Commission improperly based its action on extraneous political considerations, state a claim on which relief can be granted?

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No. 79-900

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

VS.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The decision of the Ninth Circuit holds that the complaint of Standard Oil Company of California (Socal) states a claim on which relief may be granted, and remands the case for further proceedings in the district court.[1]

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[1]The allegations of a complaint are to be liberally construed; a complaint may not be dismissed if it states a claim for relief under any set of facts that might be proved under its allegations (*Conley v. Gibson* (1957) 355 U.S. 41, 47-48).

The Ninth Circuit decision is based on allegations of a flagrant failure by the Federal Trade Commission to adhere to an explicit limitation on its authority to issue complaints embodied in its organic act. Socal's complaint alleges—with supporting detailed factual allegations (infra, pp. 3-7)—that the Commission did not make a determination of reason to believe that Socal had violated section 5 of the FTC Act, but issued its complaint in Docket No. 8934 because of extraneous political considerations unrelated to the merits of any reason to believe that Socal had violated the law.

Section 5 of the Federal Trade Commission Act provides that "[w]henever the Commission shall have reason to believe" that a violation of the Act has been or is occurring, and it appears to the Commission that a proceeding would be in the public interest "it shall issue * * * a complaint stating its charges * * *" (15 U.S.C. § 45(b)). The Ninth Circuit stated:

> "A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a 'reason to believe' determination that the law has been violated. See *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides 'law to apply' in this case because Socal claims that the FTC disregarded the restriction and acted outside the terms of the statute. Socal claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of Socal and under the pressure of outside influences. In short,

> Socal claims that the FTC did not make and, in the circumstances, could not have made the 'reason to believe' determination despite a recitation on the face of the FTC complaint that the determination had been made.
>
> "The allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim. * * *
>
> "* * * Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), Socal's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 59-60).

As the Ninth Circuit observed (J.A. 59-60), Socal's claim is supported by detailed allegations in its complaint which include the following:

In December 1971, the Commission instituted an investigation (Docket No. 721-0047) to determine whether oil companies were engaging in unfair acts or practices in violation of section 5. During the next 17 months, the Commission did not examine any of Socal's officers or employees or any of its documents, books and records (J.A. 6-7).

On May 31, 1973, Senator Jackson, as Chairman of the Interior and Insular Affairs Committee of the Permanent Investigations Subcommittee of the Senate Committee on

Government Operations, and then a presidential candidate, sent a letter to Chairman Engman asking the Commission to

> "prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products" (J.A. 7).

The "current shortages" were the first peacetime shortages of fuel oil and gasoline in the nation's history (J.A. 5, 10).

On July 6, 1973, with no examination by the Commission staff of any Socal documents or any of its officials except for three questioned only a few days before,[2] Chairman Engman sent Senator Jackson a report captioned "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," stating:

> "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission" (J.A. 8).

On July 9, Senator Jackson threatened to publish the Preliminary Staff Report as a congressional committee print

[2]On June 1, 1973, the Commission issued subpoenas to three officials of Socal who testified at investigatory hearings on June 26, 28 and 29 (J.A. 7). On June 27, The Evening Star and The Washington Daily News published an article with the heading "8 Oil Firms Face FTC Action." The article, based on "congressional sources," not FTC sources, stated in part: "The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed" (J.A. 7-8). On July 6, the Commission issued a subpoena duces tecum directing Socal to produce documents (J.A. 8), but the investigation in Docket No. 721-0047 was summarily closed before any response by Socal was due (J.A. 12).

(J.A. 9). On July 11, Chairman Engman objected to such publication, stating that

> "[t]he Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation" (J.A. 9).

On Friday, July 13, Senator Jackson released the Preliminary Staff Report for publication as a committee print (J.A. 9).

On Tuesday, July 17, with but one intervening business day after Senator Jackson released the report, and just after Chairman Engman's statement that the staff report had not been evaluated by the Commission and its public release would be "inconsistent with the Commission's duty to proceed judiciously and responsibly" in the premises, a Commission news release stated that it was issuing the complaint in Docket No. 8934 (J.A. 9-10).[3] On July 18 the complaint was issued bearing that date (J.A. 10).

Events after issuance of the complaint in Docket No. 8934 equally reveal that the Commission did not make a determination of reason to believe that Socal had violated section 5 (J.A.10). Such events include admissions by

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[3]The New York Times reported on March 16, 1975 after a review of events preceding issuance of the complaint in Docket No. 8934: "Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great pressure to file a complaint" (J.A. 10).

complaint counsel in December 1973 and in April and May 1974 that they had no evidence to support charges of the complaint (J.A. 11-12).[4] In October 1974, in their efforts to substitute post-complaint discovery for pre-complaint investigation, complaint counsel again emphasized the problems they confronted because of the absence of a pre-complaint investigation (J.A. 13-14).[5]

The first Administrative Law Judge assigned to the case recognized that the "discovery" sought by complaint counsel in Docket No. 8934 was an improper attempt to renew a prematurely terminated Commission investigation of the oil industry (J.A. 12, 14), and certified to the Commission

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[4]Complaint counsel's inability to come forward with any evidence in support the complaint stands in sharpest contrast to the normal Commission procedure of an investigation to provide basis for a staff recommendation to the Commission with regard to possible issuance of a complaint. In July 1973, the Commission's Operating Manual provided that issuance of a complaint should not be recommended to the Commission by its staff unless it "has evidence sufficient to establish a prima facie case-in-chief in support of all of the allegations of the complaint as to each party" (§ 3.21(B)(1)). Illustration 18 to the Manual required that the staff memorandum transmitting a proposed complaint include a "[c]oncise summary of the evidence underlying each factual allegation in the complaint with citations to the location of evidence in the investigational file" (par. IV.2.).

[5]Complaint counsel were still reiterating in September 1977 their discovery problems caused by the fact that before the complaint issued, "the Commission staff did not obtain any substantive document or data discovery" from Socal or other respondents (Complaint Counsel's Motion to Commission to Modify Pending Application and Obtain Expedited Decision, Sept. 28, 1977, p. 3).

in October 1974 his suggestion that the Commission consider withdrawal of the case from adjudication "so that it may be more fully investigated without the restrictions imposed by the existing rules governing adjudicative proceedings" (J.A. 14). The Commission declined the suggestion of the Administrative Law Judge (J.A. 15), but Commissioner Dixon, now the only member of the Commission who was a member in July 1973, later publicly acknowledged that the Commission had issued its complaint in Docket No. 8934 "without being ready" (Hearings before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) p. 613).

Socal showed in its complaint that it had no remedy for the unlawful action of the Commission other than suit in district court (J.A. 13, 16). The Commission had denied Socal's motion to dismiss or withdraw the complaint in Docket No. 8934, refused Socal any discovery on the reason-to-believe issue, stated that the issue would not be considered in hearings in the case, and asserted that the issue was immune from judicial review "and will not be reviewed by the courts" (Commission order, June 4, 1974, J.A. 13, 47-49).[6]

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[6]The Commission acknowledged in the same order that it had received communications from members of Congress before it issued the complaint, and offered the self-serving assurance that "[n]one of the communications received by this agency from any member of Congress is even remotely of the character deemed improper by the courts" (J.A. 47-48). *No court knows what those communications were.*

The Ninth Circuit concluded that "[t]he allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim" that the Commission had failed to ascertain the facts and make a determination of reason to believe based thereon and had unlawfully based its action on considerations irrelevant to any determination that Socal had violated the law, and that Socal's only avenue of relief was review of its claim in district court (J.A. 59-60).

SUMMARY OF ARGUMENT

Socal's complaint states a claim on which relief may be granted.

The Commission action in issuing a complaint against Socal without making a determination that there was reason to believe that Socal had violated section 5 of the FTC Act, in defiance of an express limitation on its authority, is not agency action "committed to agency discretion by law." The unreviewable power asserted by the Commission would permit it to issue a complaint for reasons having nothing to do with a violation of law and, provided only that the Commission's action was under cover of a "facially valid" complaint, no court could compel the Commission to adhere to requirements of its organic act. This Court has just reiterated, unanimously, in *Marshall* v. *Jerrico, Inc.* (1980) .... U.S. ...., 100 S.Ct. 1610, that "[i]n appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by

improper factors or were otherwise contrary to law" (100 S.Ct. 1616-1617).

The Commission's contention that its issuance of an antitrust complaint does not constitute "agency action" under the Administrative Procedure Act (APA)—a contention the Commission did not assert in its petition for certiorari but belatedly revived as the first argument in its brief on the merits—is without substance. This Court has insisted that the judicial review provisions of the APA receive a pragmatic and hospitable interpretation. The Commission action in issuing the complaint against Socal in Docket No. 8934 and the Commission order denying Socal's motion for withdrawal of the unlawfully issued complaint constitute "agency action" under the common law and the APA.

Judicial review in district court is the only adequate remedy for the Commission's issuance of a complaint without a determination of reason to believe that Socal had violated the law—a determination which is anterior to and separable from the ultimate merits of the case. Section 5 of the FTC Act specifies that review of a final Commission order in the court of appeals is directed to whether there is evidence in the record to support the Commission's findings. As the Seventh Circuit and the District of Columbia Circuit Courts of Appeals have held in *Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155 and *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, error in complaint issuance by the Commission will not be reviewed on final appeal because at that point "the standard of review will be different" and the court of

appeals "would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint" (*Jewel Companies,* supra, 432 F.2d 1159).

Moreover, the protection against groundless charges and political harassment which the reason-to-believe requirement of section 5 affords would obviously be denied if unlawful complaint issuance could be challenged only at the end of the proceeding.

ARGUMENT

I. SOCAL'S COMPLAINT STATES A CLAIM FOR RELIEF; THE COMMISSION DOES NOT HAVE UNBRIDLED AUTHORITY TO ISSUE COMPLAINTS, AND MUST ADHERE TO REQUIREMENTS OF ITS ORGANIC ACT.

The Commission's announcement of a complaint against Socal and other oil companies with but one intervening business day after Senator Jackson published the Preliminary Staff Report is a striking revelation of failure to make the reason-to-believe determination required by section 5 of the FTC Act. In *Hunt Foods and Industries, Inc.* v. *F.T.C.* (9 Cir. 1961) 286 F.2d 803, 806, certiorari denied (1961) 365 U.S. 877, the court said:

> "The Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts."[7]

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[7]The Commission acknowledged from its inception the statutory restriction imposed by the Congress on the issuance of complaints under section 5:

> "Reason to Believe—In view of the fact that the Commission is authorized to issue its complaint, not upon probable cause, but only upon grounds which give it 'reason to believe' that there has been a violation of the law, *the Commission is required to act, and has acted with the utmost circumspection*

As the Ninth Circuit held, Socal's allegations in the instant case support a reasonable inference that the Commission caved in to widely-publicized outcries over the first peacetime shortages of gasoline and fuel oil in the nation's history, and that the Commission could not, in the far-reaching and complex circumstances in question, have been able to ascertain the relevant facts and make a determination of reason to believe that Socal had violated section 5.

The Ninth Circuit's decision is grounded in long-established legal principles which guarantee judicial review of agency action that is contrary to statutory command or arbitrarily based on impermissible factors.[8] These princi-

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in the issuance of complaints and the institution of proceedings. In all cases it makes a thorough preliminary investigation of the matters charged in order that *no formal proceeding may be undertaken without an adequate foundation*" (FTC Annual Report, June 30, 1916, p. 6, emphasis supplied).

[8]Precedent from the inception of the Court establishes that there is no place for the Commission's assertion of unreviewable power in the face of an express limitation imposed by the Congress on the Commission's authority to issue complaints. Chief Justice Marshall put the query in *Marbury* v. *Madison* (1803) 1 Cranch. (5 U.S.) 137, 176:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

In *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 369-379, the Court stated that "the nature and the theory of our institutions of government" do not leave room for arbitrary power; in *Garfield* v. *Goldsby* (1908) 211 U.S. 249, 262, the Court repeated that "there is no place in our constitutional system for the exercise of arbitrary power;" and in *Morgan* v. *United States* (1936) 298 U.S. 468, 480, the Court said that "circumstances must not be considered which should not legally influence the conclusion." In *FTC* v. *Universal-Rundle Corp.* (1967) 387 U.S. 244, 251, the Court stated that "the Federal Trade Commission does not have unbridled power to institute proceedings."

ples were codified in the Administrative Procedure Act in 1946. Section 706 of the APA (5 U.S.C. § 706) provides that a court *"shall"*—"hold unlawful and set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." From the enactment of the APA to this date, this Court and lower courts have held that judicial review of agency action is the rule, and that the rare exception of nonreviewability must be supported by clear congressional intent.[9] And this Court and other courts have emphasized that such review may be a limited review, to correct an agency's failure to exercise its lawful discretion or set aside action which is in defiance of statutory requirement or based on impermissible considerations, without substituting the court's discretion for that of the agency:

> *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, 1616-1617 ("the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law");
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> *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 568 (courts have jurisdiction where "the Secretary has acted in an arbitrary and capricious manner by ignor-

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[9]See, e.g., *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410-413; *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140-141; *Adams* v. *Richardson* (D.C.Cir. 1973) 480 F.2d 1159, 1161 *(en banc); Gonzalez* v. *Freeman* (D.C.Cir. 1964) 334 F.2d 570, 575 (Burger, J.).

ing the mandatory duty he owes plaintiffs under the powers granted by the Congress");

Leedom v. *Kyne* (1958) 358 U.S. 184, 188 (the court's review is "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act");

Accardi v. *Shaughnessy* (1954) 347 U.S. 260, 268 ("we are not here reviewing and reversing the manner in which discretion was exercised * * * we object to the Board's alleged failure to exercise its own discretion");

United States v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491 (L. Hand, J.) (agency action may not be based on "considerations that Congress could not have intended to make relevant");

D.C. Federation of Civic Associations v. *Volpe* (D.C. Cir. 1972) 459 F.2d 1231, 1247-1248 (if the administrator "took into account 'considerations that Congress could not have intended to make relevant,' his action proceeded from an erroneous premise and his decision cannot stand");

Safir v. *Gibson* (2 Cir. 1969) 417 F.2d 972, 978 (the administrator is required to make a "considered decision" on "grounds consistent with the statute");

East Oakland-Fruitvale Planning Council v. *Rumsfeld* (9 Cir. 1972) 471 F.2d 524, 533 ("separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion");

Littell v. *Morton* (4 Cir. 1971) 445 F.2d 1207, 1211 ("the Supreme Court has not been tolerant of agency action which it deemed to be an abuse of the discretion granted by Congress, even where the agency is vested with broad discretion");

Peoples v. *United States Department of Agriculture* (D.C. Cir. 1970) 427 F.2d 561, 567 (agency action "is subject to judicial review for arbitrariness and abuse of discretion, even though discretion may be broad");

Medical Com. for Human Rts. v. *Securities & Exch. Com'n* (D.C.Cir. 1970) 432 F.2d 659, 675, vacated as moot (1972) 404 U.S. 403 ("[l]imited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation; it has been repeatedly sustained by the Supreme Court");

Cappadora v. *Celebrezze* (2 Cir. 1966) 356 F.2d 1, 6 ("the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion");

Chattanooga Pharm. Ass'n v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 864, 866-867.

A. "Prosecutorial discretion" is not here involved; Socal's claim is that the Commission failed to exercise its lawful discretion and acted for impermissible reason.

The Commission's exercise of prosecutorial discretion is not threatened in this case. Socal's claim does not challenge any judgmental or managerial decision of the Commission related to its evaluation of disputed facts or its allocation of enforcement resources. Socal's claim does not challenge the kinds of acts or practices which the Commission may consider to be in violation of section 5.

Socal's claim is that in this instance the Commission acted outside the bounds of an express statutory limitation on its authority. Prosecutorial discretion is not involved in the question whether the Commission issued the complaint in Docket No. 8934 without making the required determi-

nation of reason to believe that Socal was violating the law. The Commission either made that determination or it did not. If it did not—as Socal's claim directly alleges—then the issuance of the complaint did not satisfy the statutory requirement of section 5 and was invalid. This Court has confirmed the need to constrain, with limited judicial review and without intrusion on proper agency discretion, agency action that is in defiance of statutory requirements and arbitrarily premised on considerations that the Congress could not have intended to make relevant (see pp. 12-13, supra).

The Commission's brief fails to acknowledge the availability of limited judicial review to assure agency compliance with its statutory mandate. While we have no quarrel in the abstract with much of the general discussion in the Commission's brief—e.g., we do not deny that the Commission has broad discretion in deciding what cases to bring, or that unnecessary intrusion into the mental processes of the Commissioners is to be avoided, or that judicial review of Commission action should not interfere improperly with its responsibilities—these generalities do not meet the circumstances pleaded in Socal's complaint, which must be taken as true on motion to dismiss.

The flaw in Commission reasoning is illuminated by the following assertions in its brief:

> "Under the statute [section 5 of the FTC Act], there is no meaningful distinction between the factual allegations [in a Commission complaint] providing 'reason to believe' and the question whether a 'reason to

> believe' determination has in fact been made" (Commission brief, p. 29).
>
> "Here, the allegations in the administrative complaint constitute the Commission's 'findings' that there is 'reason to believe' that SOCAL and the other respondents in the administrative proceeding violated the law" (Commission brief, p. 45).

In asserting that if the allegations of a Commission complaint are sufficient on their face to state a claim under section 5 then the Commission has by definition made a sufficient reason-to-believe determination, the Commission confuses the process of determining whether there is any basis for allegations that respondent violated the law with the different question of whether allegations on their face state a cause of action. The Commission's assertion is that a bare *recital* of reason to believe precludes an inquiry into whether an actual determination of reason to believe was made by the Commission. It is obvious, however, that the mere making of allegations and recitals does not establish that the Commission made a determination that there were facts to warrant them.

Socal contends not that the allegations of the Commission complaint fail to state a claim on their face, but that the Commission failed to determine whether there was any factual basis for believing that Socal had violated section 5. As the Ninth Circuit held, "Socal's allegations are sufficient to raise the claim that the FTC * * * acted without deliberation as to Socal," and that there should be review in the district court of whether the Commission issued the complaint in Docket No. 8934 without "even making a 'reason to believe' determination at all" (J.A. 60).

Socal's complaint alleges that the Commission did not have before it any factual basis for determining that Socal had violated section 5. This case is entirely distinct from *United States* v. *Morgan* (1941) 313 U.S. 409 and *National Nutritional Foods Ass'n* v. *Food & Drug Admin.* (2 Cir. 1974) 491 F.2d 1141 (Commission brief, pp. 44, 47), where there were voluminous records to support the determinations of the agencies. Socal does not simply claim that the Commission acted too hastily on what it had before it. Socal does not know, nor does any court know—and the Commission asserts that no court is entitled to know—what the Commission had before it. The allegations of Socal's complaint regarding the publication of the Preliminary Staff Report by Senator Jackson's committee and the rapid sequence of events incident to the Commission's issuance of the complaint in Docket No. 8934, plus the admissions by complaint counsel thereafter of the absence of factual support for charges in the complaint, are to show that Socal has prima facie cause to seek a judicial inquiry into what the Commission actually did before it issued the complaint.

The Commission cites *Ewing* v. *Mytinger & Casselberry* (1950) 339 U.S. 594 (Commission brief, pp. 33, 41) for the proposition that "[l]ike a grand jury's finding of probable cause, an agency's reason to believe determination has no independent legal significance apart from the supporting factual allegations in the complaint," and cites *Costello* v. *United States* (1956) 350 U.S. 359 and *United States* v. *Calandra* (1974) 414 U.S. 338 for the rule that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of "inade-

quate" or "incompetent" evidence (Commission brief, p. 34, n. 20). What is before the Court is the statutory duty of the Commission in the initiation of civil proceedings under the FTC Act, not the historical role of the grand jury in criminal proceedings, and the Commission's arguments also confuse a bona fide determination based on some evidence with a failure to make a bona fide determination at all.

Concurring in *Costello,* Justice Burton distinguished "no evidence" from "inadequate evidence," stating that "if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed," and that "I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.' 221 F.2d 668, 677" (350 U.S. 364-365).[10]

In *United States* v. *Ciambrone* (2 Cir. 1979) 601 F.2d 616, 622, the court stated that in determining whether

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[10]Later cases carry forward the "no evidence" distinction pointed out in *Costello: United States* v. *Ciambrone* (2 Cir. 1979) 601 F.2d 616, 622; *United States* v. *Romero* (9 Cir. 1978) 585 F.2d 391, 399, certiorari denied (1979) 440 U.S. 935; *United States* v. *Briggs* (5 Cir. 1975) 514 F.2d 794, 805; *United States* v. *Tane* (2 Cir. 1964) 329 F.2d 848, 853-854; *United States* v. *O'Shea* (S.D.Fla. 1978) 447 F.Supp. 330, 332, *affirmed* (5 Cir. 1979) 588 F.2d 199; *United States* v. *Carcaise* (M.D.Fla. 1978) 442 F.Supp. 1209, 1212-1213. In *O'Shea,* supra, the court observed:

> "This is not a case which challenges an indictment because of the quality of the evidence. The problem here is that there simply is no evidence sufficient to establish probable cause that the defendant Lawson committed any one of the three offenses of which he is charged" (447 F.Supp. 332).

probable cause exists the grand jury "has the equally important duty of protecting persons against unfounded or unsupported charges and, absent a finding of probable cause, it may not file an indictment."

In *United States* v. *Carcaise* (M.D.Fla. 1978) 442 F.Supp. 1209, in dismissing an indictment the court emphasized the need for evidence as to each defendant and for time to deliberate:

> "[*W*]*ithout some reasonably careful scrutiny of each defendant's conduct, the grand jury could not have fulfilled its obligation to protect citizens against unfounded criminal prosecution and the enoromous consequences that are attendant on any criminal prosecution well-founded or otherwise.* [citing authority]
>
> "* * * This court does not know what use the grand jury made of the depositions, but it is not reasonable to assume that the grand jury, unaided by a competent expert witness, could have read and understood the 1160 pages of deposition testimony in a session of six hours and forty-five minutes a part of which was occupied by other matters" (442 F.Supp. 1213, emphasis supplied).

In the difficult and complex circumstances, and without any investigation of Socal's operations, the Commission could not have made a determination of reason to believe that Socal had violated section 5 before it rushed out the complaint in Docket No. 8934.

The *Ewing* case is otherwise not in point of present circumstances and is misleadingly characterized in the Commission's assertion that it "held that an administrative 'probable cause' determination is not judicially reviewable" (Commission brief, p. 33). The issue in *Ewing* was whether a *hearing* was a pre-requisite to a seizure of an allegedly misbranded drug (cf., *Fuentes* v. *Shevin* (1972) 407 U.S. 67, 90-92). Socal does not contend that it was entitled to a hearing before the Commission issued its complaint in Docket No. 8934; Socal contends that the Commission issued the complaint in defiance of an express statutory limitation on its authority. The Commission also does not mention that, unlike the Commission's issuance of a complaint upon its determination of reason to believe, in the mislabeled-drug setting of *Ewing*, "[w]hether a [libel] suit will be instituted depends on the Attorney General, not on the administrative agency" (339 U.S. 599). The Court reiterated in *Ewing* that "[t]he [FDA] determination of probable cause in and of itself had no binding consequence [because] * * * [i]t took the exercise of discretion on the part of the Attorney General, as we have pointed out above, to bring it into play against appellee's business" (339 U.S. 600). Moreover, in direct contrast to the instant case, there was no claim in *Ewing* that either the FDA administrator or the Attorney General had failed to exercise his discretion in making the probable cause determination.

There is no genuine risk that every respondent in a Commission proceeding will challenge the Commission's reason-

to-believe determination.[11] Socal has shown that in this instance the Commission, under pressures which are a matter of record, failed to make the pre-complaint investigation it ordinarily makes as the foundation for determining whether or not to issue a complaint. In their letter to the Solicitor General, general counsels of other agencies acknowledge that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Commission Pet. for Cert., Appx. F, p. 33a).

The Commission suggests that, if its issuance of a complaint without the reason-to-believe determination required by section 5 of the FTC Act were subjected to judicial review, then other agencies would also be required to adhere to the terms of their organic acts, and "disruptive and dilatory litigation" would result (Commission brief, pp. 26 n. 15, 34 n. 18, 35 n. 21). The answer is two-fold. First, regulatory agencies should not issue complaints without a determination of reason to believe that there has been a violation of law (we are not aware that there is any widespread disregard of this principle), and a failure by an agency in that respect should be judicially corrected. Second, the seven-year history of pre-trial proceedings in Docket No. 8934 demonstrates that issuance of complaints

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[11]District judges are well able, with tools provided by Rules 11, 12, 16, 26(c) and 56 of the Federal Rules of Civil Procedure, to deal with any complaint by a respondent which fails to present a substantial showing of wrongful conduct by the Commission. Cf., *Medical Com. for Human Rts.* v. *Securities & Exch. Com'n* (D.C.Cir. 1970) 432 F.2d 659, 675, vacated as moot (1972) 404 U.S. 403; *Chattanooga Pharm. Ass'n* v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 834, 866.

without basis in investigation and evaluation of facts related to respondents creates more disruption than does adherence to the rule of law. After seven years, it cannot be said either when or how Docket No. 8934 can be brought to trial without an ineradicable taint of denial of due process of law, or how, in light of far-reaching changes in the petroleum world since the complaint issued, any public purpose could be served by an immensely costly and burdensome trial of hopelessly out-dated issues. The conduct of a proper investigation by the Commission before any complaint issues remains the practical and sensible, as well as the lawfully required, course of action. The Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, January 22, 1979 (reprinted as Special Supplement to BNA ATRR, No. 897, Jan. 18, 1979), emphasized the importance in government cases of "greater use of pre-complaint investigations to produce well-organized, well-focused cases" (p. 18).

We do not at all suggest, as the Commission brief would have it (p. 46), that congressmen or Executive branch officials or members of the public may not express to the Commission interest in matters which may become the subject of a Commission complaint, and we are well aware that oil industry antitrust issues are matters of congressional interest. The showing made by Socal in this case, however, is not of a complaint supported by a Commission determination of reason to believe the law had been violated in an area in which there was congressional interest; Socal alleges that this complaint was issued without any fact evaluation in response to outcries over fuel oil and gasoline shortages.

Suppose the Commission's files contain a memorandum of a Commissioner saying, "We do not have anything to indicate that Socal has violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway." The Commission's contention of absolute unreviewability would render such agency conduct immune from correction by the courts. Under the rule of law, an opportunity must be afforded to present such a document in a court of law.

B. The Commission's issuance of a complaint without a determination that Socal had violated the law is not agency action "committed to agency discretion by law."

The Commission's contention that its complaint issuance is entirely "committed to agency discretion by law" and unreviewable ignores the specific language of the APA, which precludes judicial review only *"to the extent that"* agency action is so committed (5 U.S.C. § 701). As the Court held in *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, this exception prevents a court from "substitution of its judgment" for the Commission's judgment, but does not preclude a limited judicial review to insure that the Commission exercised its discretion on the facts (421 U.S. 572).

There is no statutory proscription of judicial review in the instant case. In such circumstances, the Commission "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision" (*Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 567). Judicial review will be cut off entirely "only upon a showing of 'clear and convincing evidence' " of legislative intent to do so (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 141). The Commission's brief

(pp. 30-31) points to no such clear and convincing evidence in the history of the Federal Trade Commission Act.[12]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410, the Court said that the committed-to-agency-discretion exception to judicial review of 5 U.S.C. § 701(a)(2) "is a very narrow exception" which applies only "in those rare instances where 'statutes are drawn in such broad terms that * * * there is no law to apply.'" Here as the Ninth Circuit held (J.A. 59), there is plainly law to apply under section 5 of the Federal Trade Commission Act,[13] in that the Commission must make an eval-

[12]The Commission asserts that "[t]he public interest determination has long been held unreviewable," citing *Hills Bros.* v. *Federal Trade Commission* (9 Cir. 1926) 9 F.2d 481, certiorari denied (1926) 270 U.S. 662, and that "[n]othing on the face of the statute suggests" that different considerations may relate to the "reason to believe" and the "public interest" requirements of section 5 (Commission brief, p. 27). This Court held in *Federal Trade Comm.* v. *Klesner* (1929) 280 U.S. 19, 30, that the public interest determination *is reviewable*, and stated that "the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review." And this Court held in *Fed. Trade Comm.* v. *Raladam Co.* (1931) 283 U.S. 643, 648-649, that the reason-to-believe determination is "a necessary prerequisite to the issue of a complaint," whereas the further finding of public interest derives from words which "are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding."

[13]Section 13 of the Federal Trade Commission Act (15 U.S.C. § 53) provides that "[w]henever the Commission has reason to believe" that a person is violating the Act, it may upon a proper showing in district court obtain an injunction pending the trial of a Commission complaint. In *F.T.C.* v. *British Oxygen Co., Ltd.* (3 Cir. 1976) 529 F.2d 196, 199 *(en banc)*, the Third Circuit stated that "§ 13(b) requires that the Commission show the district court that it has 'reason to believe' a violation has occurred." The reason-to-believe requirement must afford "law to apply" under section 5 as well as under section 13.

uation of whether there is reason to believe that Socal violated the law and must not issue its complaint on the basis of impermissible political factors.[14] See, holding that in cases where political influence overrides the exercise of lawful discretion there is "law to apply," *Accardi* v. *Shaughnessy* (1954) 347 U.S. 260, 266-268; *D.C. Federation of Civic Associations* v. *Volpe* (D.C. Cir. 1972) 459 F.2d 1231, 1247-1248, certiorari denied (1972) 405 U.S. 1030; *Pillsbury Company* v. *F.T.C.* (5 Cir. 1966) 354 F.2d 952, 964.

The Commission asserts that "[a] comparison of this case with *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), underscores our contention that the issuance of the Commission's complaint is an exercise of prosecutorial discretion beyond the power of the courts to review" (Commission brief, p. 38). We suggest to the Court that the reverse is true, and that the Ninth Circuit correctly applied in this case the same standard for narrowly-drawn

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[14]The Commission brief cites (p. 26, n. 15) *Hahn* v. *Gottlieb* (1 Cir. 1970) 430 F.2d 1243, and two other circuit court opinions, for the contention that "[s]ome courts have employed a more pragmatic analysis" than this Court's test of "law to apply" in determining whether an agency determination is subject to review. Without agreeing that this Court's approach is any "less pragmatic," we note here that, contrary to Commission assertion, the reason-to-believe issue at hand fully meets the factors mentioned in the *Hahn* opinion: (1) courts deal every day with probable cause issues; (2) the limited review here directed will not impair the effectiveness of the Commission, but as this Court observed in *Dunlop* will "assure careful administrative consideration" of the action taken (421 U.S. 572); and (3) there is clear and traditional need for judicial supervision to preclude arbitrary Commission conduct damaging to respondents.

review of a decision regarding complaint issuance that this Court applied in *Dunlop*.

In *Dunlop,* the Court rejected the view that agency decisions on complaint issuance are immune from judicial review for any reason, and rejected the "all or nothing" approach to judicial review advanced by the Commission in the instant case.[15] The Court concluded that a decision by the Secretary of Labor not to file suit under the Labor-Management Reporting and Disclosure Act could be reviewed to insure that the Secretary had discharged his statutory duty to the plaintiff:

> "[C]ourts 'are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes to plaintiffs under the powers granted by the Congress. [citing authorities]' " (421 U.S. 568).

The Court proceeded to hold that a limited review of a particular complaint issuance decision was not inconsistent with the Secretary's general exercise of broad discretion to initiate proceedings, and served "to assure careful administrative consideration" of the action taken (421 U.S. 572). Thus, although "review may not extend

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[15]In *East Oakland-Fruitvale Planning Council* v. *Rumsfeld* (9 Cir. 1972) 471 F.2d 524, 533, the Ninth Circuit stated:

> "An 'all or nothing' approach to reviewability would, in specific cases, either be unfair to persons aggrieved by agency action, or impose an unwise burden upon the agency or the courts. Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion."

to cognizance or trial of * * * the factual bases for the Secretary's conclusion," a court was required to "determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all" (421 U.S. 573).

In this case, the Ninth Circuit applied precisely the narrowly-drawn standard of review articulated by this court in *Dunlop*: "we emphasize that review is limited" and "cannot extend to an assessment by the district court of what constitutes 'reason to believe'" but must determine "simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 60).

In a strained effort to distinguish *Dunlop*, the Commission has tendered a singularly misleading version of what the Court did in that case (Commission brief, pp. 38-39). The Commission argues that the Court "adopted that portion of the Third Circuit's opinion" in *Dunlop* which held that "'the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights,'" and then argues that *Dunlop* involved individual rights whereas this case involves a governmental interest. To the best of our reading of *Dunlop*, the Court did *not* adopt the opinion or reasoning of the Third Circuit, whose decision was reversed, but applied the same principle of narrow review applied by the Ninth Circuit in this case, and made no reference to the purported distinction between

public and private interests advanced by the Commission in this case.[16]

In his concurring opinion in *Dunlop,* Chief Justice Burger stated that "I join the opinion of the Court with the understanding that the Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action on behalf of a complainant to set aside an election" (421 U.S. 590). The same is true of the narrow scope of review of the Commission's reason-to-believe determination articulated by the Ninth Circuit in this case.[17]

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[16]In this connection, in the petition for certiorari and in the brief on the merits submitted on behalf of the Secretary of Labor in *Dunlop,* the Solicitor General expressly disavowed the Third Circuit's rationale; in his petition, the Solicitor General said that "this purported distinction is unpersuasive" (p. 11), and in his brief on the merits stated that "the policy of the LMRDA * * * is not to bestow benefits on individual complainants, but to vindicate the interest of the membership in democratic procedures and of the public at large in labor peace" (p. 31).

[17]In *Southern R. Co.* v. *Seaboard Allied Milling Corp.* (1979) 442 U.S. 444, 456 (cited in Commission brief, pp. 25, 26, 37), the Court distinguished the permissive language of section 15(8)(a) of the Interstate Commerce Act, which it held did not create a reviewable duty, from the mandatory language ("shall") of section 13(1) of the Act, which creates a reviewable duty. The mandatory language of section 13(1) is the analog of that in section 5 of the FTC Act: the Commission *"shall"* have reason to believe that a violation of the Act has occurred before issuing a complaint.

Moreover, in both *Southern R.*, 442 U.S. 454, and *Morris* v. *Gressette* (1977) 432 U.S. 491, 505 (also cited in Commission brief, pp. 25, 37), the Court's decision rested significantly on the fact that other avenues of judicial review were available to aggrieved parties. In the instant case, Socal has no other way to obtain review of the Commission's unlawful failure to comply with its organic act (see pp. 38-47, infra).

Moreover, the "individual rights" of Socal are obviously implicated by the Commission's failure to comply with a condition of its organic act which is designed to prevent unfounded proceedings and harassment of respondents. The circumstances at bar present a stronger case for judicial review than those in *Dunlop,* where review of an agency determination *not* to issue a complaint was upheld. While the Commission asserts that "[t]here is no reason for a different standard when a complaint is issued, rather than refused" (Commission brief, p. 39), there is in fact substantial reason for granting review when a respondent is charged with wrongdoing without any determination of a basis therefor, even if review were to be denied of a Commission determination not to proceed (an issue not before the Court).[18]

In *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, citing *Dunlop* and other authorities this Court made a unanimous restatement of the rule that administra-

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[18]In *United States* v. *Falk* (7 Cir. 1973) 479 F.2d 616, 620 *(en banc)*, the court held that the defendant was entitled to an evidentiary hearing on allegations "sufficient to raise a reasonable doubt" that his prosecution had been instituted for an improper purpose, and stated that prosecutorial discretion "does not mean that a criminal defendant is never to be afforded an opportunity to prove that the prosecution stems from an improper prosecutorial design." In the comment Curbing the Prosecutor's Discretion, *United States* v. *Falk,* 9 Harv.Civil Rights Civil Liberties L.Rev. (1974) 372, 377, it was pointed out that:

> "A federal prosecutor does not have discretion to bring charges against a person he knows to be innocent or withhold prosecution against a close relative he knows to be guilty. Moreover, even if it were proper to allow broad discretion not to bring charges, *the arguments for review are far stronger where an individual is singled out*" (emphasis supplied).

tive enforcement decisions which were motivated by improper factors or otherwise contrary to law are not immune from judicial review. The Court observed:

> "Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 793 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v *FTC*, 355 U.S. 411, 414, 78 S.Ct. 377, 380, 2 L.Ed.2d 370 (1958); *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 (1967)" (100 S.Ct. 1616).

And the Court then stated:

> "In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, n. 7, 568-574, 95 S.Ct. 1851, 1858, n. 7, 1858-1861, 44 L.Ed.2d 377 (1975); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939). Moveover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215-256 (2d. ed. 1979)" (100 S.Ct. 1616-1617).

C. The Commission's "mental processes" are not endangered by the instant case, and in no event does the law prohibit an examination into the process of administrative determination where there is a showing of irregularity.

The Commission's assertion that the narrow review specified by the Ninth Circuit in the instant case "would require an unjustified inquiry into the Commissioners' mental processes" (Commission brief, p. 44; also, pp. 14, 24) is erroneous for two reasons.

First, it disregards the scope of the review. As the Ninth Circuit stated, "that review is limited" and "cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 60). The decision below explicitly rejected the proposition that courts involve themselves in weighing the *quality* of Commission reason-to-believe determinations, but insisted that courts cannot abdicate their responsibility to review in a proper case whether the Commission actually made a reason-to-believe determination to support the issuance of a complaint. As heretofore observed (p. 17, supra), the circumstances of the case at hand are distinctly different from those of *United States* v. *Morgan* (1941) 313 U.S. 409, 422 (cited in Commission brief, pp. 24, 44).

Second, the mental processes of agency officials are not sacrosanct. The presumption of administrative regularity normally precludes inquiry into the process of a Commission determination, but the presumption is not irrebuttable as the Commission's brief implies. Numerous decisions establish that where, as in the case at bar, a plaintiff makes

a prima facie showing of failure to discharge a statutory duty, a court may and should permit the inquiry necessary to resolve a claim of administrative failure to adhere to the rule of law:

> "[T]he mental process rule [of the *Morgan* case] is but 'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies [citing authority]. Thus, we conclude, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable [citing authority]" (*Singer Sewing Machine Company* v. *N.L.R.B.* (4 Cir. 1964) 219 F.2d 200, 208).[19]

The district courts have ample power to control discovery and to avoid *unnecessary* probing of the Commission's deliberative process.

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 420, the Court affirmed that a court "may require the administrative officials who participated in the decision to give testimony explaining their action," and that, although "inquiry into the mental processes of administrative decision-makers is usually to be avoided," it may and should be allowed upon a showing of irregularity,

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[19]Accord, see, e.g., *United States* v. *Nixon* (1974) 418 U.S. 683, 706, 709; *D.C. Federation of Civic Associations* v. *Volpe* (D.C.Cir. 1972) 459 F.2d 1231, 1248, certiorari denied (1972) 405 U.S. 1030; *Sun Oil Company* v. *United States* (Ct.Cl. 1975) 514 F.2d 1020, 1024-1025; *KFC National Management Corp.* v. *N.L.R.B.* (2 Cir. 1974) 497 F.2d 298, 305; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.C.Cir. 1971) 463 F.2d 788; *Peoples* v. *United States Department of Agriculture* (D.C.Cir. 1970) 427 F.2d 561, 567; *Bank of Dearborn* v. *Saxon* (E.D.Mich. 1965) 244 F.Supp. 394, affirmed (6 Cir. 1967) 377 F.2d 496.

even where there are "administrative findings."[20] In *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, the Court likewise recognized that, absent any showing of irregularity, a statement by the Secretary of Labor of his reasons for refusing to issue a complaint would be sufficient for judicial review, but that the unusual case involving evidence that the Secretary's "decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act'" would be "a matter of grave public concern" justifying further judicial inquiry (p. 574). In the instant case, Socal's allegations, which the Ninth Circuit held supported a reasonable inference that the Commission had violated its statutory mandate by failing to make a reason-to-believe determination, stand admitted on motion to dismiss the complaint.[21]

D. The Commission's issuance of the complaint in Docket No. 8934 and its order denying Socal's motion for withdrawal of the complaint constitute "agency action."

The Commission attempts to revive, as the initial contention in its brief, the argument that the Commission's issu-

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[20]As previously pointed out (p. 16, supra), the Commission erroneously contends that "the allegations in the administrative complaint constitute the Commission's 'findings' that there is 'reason to believe'" (Commission brief, p. 45), thus confusing allegations with facts and *recitals* with findings. Socal's claim is that the recital of reason to believe in the complaint in Docket No. 8934 is a bare recital, and that the Commission did not make any genuine determination or finding of reason to believe at all.

[21]The Commission argues that Socal's claim fails to show "that the Commission issued its complaint under compulsion or duress" (Commission brief, p. 46). The applicable law is not cast in terms of "compulsion" or "duress." It is cast in terms that an agency may not act on the basis of arbitrary factors not related to violation of law by a respondent or upon "considerations that Congress could not have intended to make relevant" (Judge Learned Hand in *United States* v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491).

ance of an antitrust complaint under section 5 of the FTC Act does not constitute "agency action" within the APA.[22] The Commission tendered this argument to the Ninth Circuit, which disposed of it concisely and in the pragmatic spirit of the APA review provisions:

> "The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a 'broad spectrum of administrative actions.' *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)" (J.A. 56).

The purpose of the judicial review provisions of the APA —which incorporated and elaborated the existing common law—is to protect the substantial rights of persons exposed to agency proceedings and to require agencies to conduct themselves in accordance with statutory limitations and due process of law. Courts are properly skeptical of claims of immunity from judicial review for agency action that has serious practical consequences. Judicial review is afforded by the common law for agency conduct that is "in excess of its delegated powers and contrary to a specific prohibition" in its enabling act (*Leedom* v. *Kyne* (1958) 358 U.S. 184, 188). The APA "reinforced" earlier modes of review and was "designed to give an additional remedy and not to cut down more traditional channels of review" (*Abbott*

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[22]The Commission's petition for certiorari made no reference to the point. The Commission changed the question as it is stated in the petition—whether the complaint issuance was "a matter 'committed to agency discretion by law'" (Pet., p. 2)—to the question as it is stated in the Commission's brief—whether the complaint issuance was "'agency action * * * committed to agency discretion by law'" (Commission brief, p. 2).

Laboratories v. *Gardner* (1967) 387 U.S. 136, 140, 142; see also *School of Magnetic Healing* v. *McAnnulty* (1902) 187 U.S. 94, 108, and *Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 861, 863). Pursuant to the traditional judicial power to review agency conduct that "violated express statutory conditions of its authority," the issuance of complaints by the Federal Trade Commission was held subject to judicial review in *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, 344-345, and *Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155, 1158-1159.

The review provisions of the APA are thus not to be given a narrow parsing that might be appropriate to an IRS regulation, but are to receive a pragmatic and hospitable interpretation appropriate to a broad charter for judicial review. The Legislative History of the Administrative Procedure Act (Senate Document No. 248, 79th Cong., 2d Sess. (1946)) shows that both the Senate and the House Judiciary Committee Reports said (pp. 197-198, 255) that the definition of "agency action" is intended to

> "assure the complete coverage of every form of agency power, proceeding, action or inaction."

In *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140-141, the Court said:

> "The legislative material elucidating that seminal act [the APA] manifests a Congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' [citing cases]."

In *Independent Broker-Deal. T. Ass'n* v. *Securities & E. Com'n* (D.C.Cir. 1971) 442 F.2d 132, the court rejected the SEC's argument that its involvement in the elimination of "give-ups" by the New York Stock Exchange did not constitute "agency action" within the APA:

> "If linguistic technicalities are honored, and the practicalities of administrative involvement ignored, we will have in truth unleashed a 'monster which rules with no practical limits on its discretion' " (422 F.2d 141).

As the Ninth Circuit pointed out in this case, the definition of "agency action" in the APA is illustrative rather than exclusive. The definition *"includes"* the whole or a part of a "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. § 551 (13)). The verb "include" does not mean "limited to." Webster's Unabridged Third International Dictionary defines "include" to mean "to place, list, or rate as a part or component of a whole or of a larger group, class or aggregate."

Nor has the Commission acknowledged the *order* it entered which denied Socal's motion for withdrawal of the complaint (J.A. 47-49), and "order" is one of the terms expressly listed in the definition of "agency action" (5 U.S.C. § 551(6) and (13)).

The Commission cites *Gifford-Hill & Company, Inc.* v. *F.T.C.* (D.C.Cir. 1975) 523 F.2d 730, 732, as concluding that "the decision to institute an adjudicatory proceeding is not an 'agency action' " (Commission brief, pp. 20-21). This is a classic example of quoting out of context. In *Gifford-Hill*,

plaintiff claimed that the Commission could not initiate a divestiture proceeding against it without preparing an environmental impact statement under provisions of the National Environmental Policy Act (NEPA). Pointing out that it was the final order in a Commission proceeding that could have environmental impact, and not the filing of the complaint, the court held that plaintiff lacked standing to challenge issuance of the Commission complaint on that ground, citing the APA provision that "[a] person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action" should have access to judicial review. The court did *not* hold that issuance of a Commission complaint is not "agency action" reviewable under the APA, as the Commission's brief suggests, but that complaint issuance is not an agency action which aggrieves a respondent *in the sense of violating NEPA.*

Under the authorities we have cited (pp. 18-19, 24-26, 34-35, supra), the unlawful issuance of a complaint by the Commission clearly does legal wrong to and aggrieves the respondent. This Court has just stated in *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, 1617, that "the decision to enforce * * * may itself result in significant burdens on a defendant."

The Commission's citation of *ITT* v. *Electrical Workers* (1975) 419 U.S. 428 (Commission brief, pp. 19, 22) is equally inapposite. The issue in *Electrical Workers* was not whether an agency decision to issue a complaint constituted an "agency action," but whether informal proceedings of the NLRB under section 10(k) of the National Labor Relations Act constituted an "adjudication" under section 551 of the APA that invoked the procedural safeguards of

section 554. The Court held that "the 10(k) determination is not itself a 'final disposition' within the meaning of 'order' and 'adjudication'" in section 551 of the APA (p. 444).

Here, the question is not whether the Commission's complaint issuance process is an "adjudication," which it obviously is not, but whether the Commission may subject a respondent to the burdens of an antitrust proceeding without making the reason-to-believe determination required by its organic act.[23]

II. SOCAL HAS NO AVENUE OF JUDICIAL REVIEW EXCEPT ITS SUIT IN DISTRICT COURT.

The Commission's contention that its complaint issuance in Docket No. 8934 and its order refusing to withdraw the complaint and denying Socal any discovery or hearing on

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[23]The remaining cases cited by the Commission on the "agency action" point (Commission brief, pp. 18-19 and n. 12) are wholly out of point of the instant case. *Hearst Radio* v. *Federal Communications Commission* (D.C.Cir. 1948) 167 F.2d 225, *Pharmaceutical Manufacturers Ass'n* v. *Kennedy* (D.Md. 1979) 471 F.Supp. 1224, and *In re FTC Corporate Patterns Report Litigation* (D.D.C. 1977) 1977-2 Trade Cases ¶ 61,544, all involved challenges to the gathering and dissemination of information by agencies. *Fed. Power Comm'n* v. *Edison Co.* (1938) 304 U.S. 375 and *United States* v. *Los Angeles R.R.* (1927) 273 U.S. 299 also involved agency information gathering. Nothing in the case at bar affords any meaningful parallel with inspection of retail store decorations (*Nat. Orn. & El. Lt. Xmas Ass'n* v. *Con. Prod. Saf. Com'n* (2 Cir. 1975) 526 F.2d 1368); informal discussions between the FCC and a telephone company (*Public Utilities Com'n of State of Cal.* v. *United States* (9 Cir. 1966) 356 F.2d 236); non-binding recommendations against expansion of recreation facilities (*Friends of Yosemite* v. *Frizzell* (N.D.Cal. 1976) 420 F.Supp. 390); or environmental effects from spraying of weedkiller (*People for Environmental Progress* v. *Leisz* (C.D.Cal. 1974) 373 F.Supp. 589).

the reason-to-believe issue do not constitute "final agency action" subject to judicial review disregards the Court's admonitions that the "generous" review provisions of the APA must be given a "hospitable interpretation," and that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way" (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 149). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost" (*Mathews* v. *Eldridge* (1976) 424 U.S. 319, 331, n. 11; cf. *Cohen* v. *Beneficial Loan Corp.* (1949) 337 U.S. 541, 546).

The Administrative Procedure Act specifies that agency action "subject to judicial review" includes "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. § 704). The legislative history of the Act makes clear that this language was to receive a practical construction:

> "The Committee on the Judiciary of both the House and the Senate included in their reports a statement that 'final action includes any effective agency action for which there is no other adequate remedy in any court' * * *. We thus construe 'final action' as used in § 10(c) of the Administrative Procedure Act [5 U.S.C. § 704] * * * to mean what the Committee said it meant" (*Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 865-866).[24]

[24]In *Deering Milliken*, Chief Judge Haynsworth affirmed an injunction against an interlocutory remand order of the NLRB found to be in violation of section 6(a) of the APA which requires the agency to "proceed with reasonable dispatch to conclude any matter presented to it." Plaintiff's claim of unlawful delay could not be remedied on review of a final order in the proceeding. Socal similarly has no other adequate remedy to vindicate its claim.

In the instant case, Socal has no avenue to obtain judicial review of the Commission's unlawful conduct other than its suit in the district court. The Commission's ambivalent suggestion that Socal might be able to obtain review of its contention that the complaint was unlawfully issued upon final review of the cease and desist order that may ultimately be entered in Docket No. 8934 a decade or more in the future (Commission brief, pp. 55-56) is incorrect both as a practical matter and as a legal matter.

As a practical matter, it is preposterous to suggest that a court of appeals, a decade or more hence, after entry of a cease and desist order in a massive Commission proceeding, would vacate the order even though it was supported by substantial evidence and remand the case for further proceedings to determine whether the Commission had adhered to a statutory requirement when it issued the complaint back in 1973. The Commission acknowledges this but asserts: "The mere possibility that an issue might not be reviewable at a later stage is not sufficient reason to justify interlocutory review" (Commission brief, p. 55). And the Commission in a footnote says, "we submit that a cease and desist order supported by sufficient evidence of a violation is not subject to challenge on the ground that the Commission failed to make a 'reason to believe' determination at the outset of the proceeding" (Commission brief, p. 40, n. 26). That bold assertion of a Commission prerogative to issue a complaint without any factual basis and for any vindictive reason it might choose, beyond correction by any court at any time, is not and should not be the law in the United States.

As a legal matter, section 5(c) of the FTC Act (15 U.S.C. § 45(c)) provides that the court of appeals shall review the Commission's cease and desist order and that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The courts of appeals have accordingly held that on review of a cease and desist order, the question before them is whether the order is supported by substantial evidence, not whether there was lawful basis for issuance of the complaint in the first instance (*Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155; *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, 344 ("[t]he prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. The type of procedural error appellant asserts is not of a kind which affects the Commission's substantive findings")).[25] In *Jewel Companies,* supra, the court held that appellate review of a Commission cease and desist order was not an adequate remedy for a claim that a Commission complaint had been invalidly issued upon the irregular vote of one Commissioner:

> "If the question of the Commissioner's obligation is postponed until final appeal of a Commission order,

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[25]See Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv.L.Rev. (1975) 980, 986, n. 39, citing *Jewel Companies* and *Elmo Division* in support of the statement that "there are occasions when orders that are formally part of an ongoing proceeding should be made immediately reviewable;" for example, "direct review of the agency's complaint initiation procedures may be had if later review would be incapable of providing a remedy," noting specifically that statutory review in the court of appeals under the FTC Act is directed to the final cease and desist order (p. 988).

> *the standard of review will be different. At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint.* As in *Skinner & Eddy* [*Skinner & Eddy Corp.* v. *United States* (1919) 249 U.S. 557], 'the so-called administrative remedy was without relevance to the plaintiff's claim' " (432 F.2d 1159, emphasis supplied).

The Commission's argument that heavy expenses of exhausting an administrative remedy will not justify *pre-exhaustion* judicial review, and its reliance on the statement in *Myers* v. *Bethlehem Corp.* (1938) 303 U.S. 41 (Commission brief, p. 49) that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," and cases applying that familiar principle (Commission brief, pp. 52-53), are misplaced in present circumstances. Those cases hold that the agency must be afforded the opportunity to make determinations before judicial review is available.[26] Here, the Commission has asserted that its deter-

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[26]Cf., *Leedom* v. *Kyne* (1958) 358 U.S. 184, 188, where the Court held that the district court had jurisdiction to review an NLRB order which certified a bargaining unit including professional employees in violation of a statutory requirement to determine whether a majority of professional employees would vote for inclusion in the unit, despite the general rule of *A. F. of L.* v. *Labor Board* (1940) 308 U.S. 401, that an NLRB certification order is not subject to direct judicial review:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

mination of reason to believe was made before the complaint issued, has denied Socal's motion for withdrawal of the complaint, and has denied Socal any discovery on the issue and stated that the question is neither open for consideration in hearings in the case nor subject to review in any court at any time (J.A. 47-49).[27]

The reviewability in district court of the Commission's failure to make the statutorily required reason-to-believe determination, which is "a necessary prerequisite to the issue of a complaint" (*Fed. Trade Comm.* v. *Raladam Co.* (1931) 283 U.S. 643, 649) and a determination *anterior to* commencement of the proceeding, is further supported by decisions permitting review of analogous issues under 28 U.S.C. § 1291. In *Cohen* v. *Beneficial Loan Corp.* (1949) 337 U.S. 541, the Court held that the requirement of secur-

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[27]While the Commission's order (J.A. 47-49) avers that its reason-to-believe determination is not open to judicial review, its brief in this Court also suggests that, if it is, then "like any other preliminary ruling preserved in the administrative proceeding, [it] may be reviewed in connection with any cease and desist order ultimately issued by the Commission," citing section 704 of the APA (Commission brief, pp. 55-56). That alternate suggestion ignores the scope of statutory review in the court of appeals, which is to determine whether there is evidence to support the Commission's findings (see pp. 41-42, supra). Nor is it any answer to suggest that on review of a cease and desist order the court of appeals can solve the absence of any record on the reason-to-believe issue by remanding the case for "supplementation of the record" (Commission brief, p. 55). In *Dolcin Corp.* v. *FTC* (D.C.Cir. 1955) 219 F.2d 742, 750-752, certiorari denied (1955) 348 U.S. 981, relied upon by the Commission for the notion that the record can readily be supplemented a decade or more hereafter, the respondent had the evidence in question—a clinical test—in its own possession. Socal would have no evidence on the unlawful complaint issuance because the Commission has foreclosed that inquiry from hearings in Docket No. 8934.

ity as a condition to the initiation of a stockholder's derivative action was appealable as a "final decision" under 28 U.S.C. § 1291. Justice Jackson stated for the Court:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. * * * But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> "Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. * * * But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. * * *
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction" (p. 546).

As previously noted (p. 39, supra), the Court has applied the same principles to review of agency action under the APA (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136,

149; *Mathews* v. *Eldridge* (1976) 424 U. S. 319, 331, n. 11, citing *Cohen*).[28]

In *Abney* v. *United States* (1977) 431 U.S. 651, the Court applied *Cohen* doctrine to review as a "final decision" a district court order which refused to dismiss an indictment on grounds of double jeopardy. Chief Justice Burger, speaking for the Court, quoted extensively from *Cohen* (pp. 658-659), further quoted from Justice Jackson's separate opinion in *Stack* v. *Boyle* (1951) 341 U.S. 1, 12, that "[w]hile a final judgment always is a final decision, there are instances in which a final decision is not a final judgment" (p. 658), and then stated:

> "* * * [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. * * * Rather, he is contesting the very authority of the Government to

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[28]See also, *Mercantile Nat. Bank* v. *Langdeau* (1963) 371 U.S. 555, 558, in which the Court reviewed under 28 U.S.C. § 1257 a state court order on venue under the Federal statute regulating proceedings against national banks:

> "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

hale him into court to face trial on the charge against him" (pp. 659-660).

Respondent in the case at bar similarly is "contesting the very authority of the Government to hale him into court to face trial on the charge against him." Socal's claim is that the Commission failed to make a reason-to-believe determination which is requisite to and anterior to the issuance of a Commission complaint; Socal is not challenging whether the allegations state a claim for relief on their face nor the ultimate merits of the purported charge.

Still more precisely in point is the decision of the Ninth Circuit in *United States* v. *Griffin* (9 Cir. 1980) 617 F.2d 1342 in which defendant appealed from a district court order denying his motion to dismiss the indictment on grounds of vindictive prosecution. The Ninth Circuit held the order appealable under *Cohen* and *Abney,* pointed out that "all the facts relevant to the vindictive prosecution claim will be apparent and known to the parties prior to trial" and that "[n]o further purpose can be served by postponing a determination of the issue," and stated:

> "* * * [T]he vindictive prosecution doctrine is a limit on prosecutorial discretion, and goes to the very authority of the prosecution to hale the defendant into court in the first place. [citing authority] Obviously, this right would be irreparably lost if appellate review had to await the final outcome at trial. As recognized in *Abney,* an integral part of the process of defending oneself in a criminal prosecution is the 'personal strain, public embarrassment, and expense' which inevitably results. * * *

> "In holding that the order of the district court is immediately appealable under 28 U.S.C. § 1291, we do not agree with appellee's contention that such a decision will open the floodgates of interlocutory appeals of due process claims. Freedom from vindictive prosecution is a meaningful right only if it protects against being brought into court to defend against the charges" (pp. 1345-1346).

Socal's claim that the complaint in Docket No. 8934 issued for impermissible political reason and without the statutorily required determination of reason to believe that Socal had violated section 5 of the FTC Act is subject to review in district court. If review in district court were denied, Socal's statutory right would be irreparably lost, not only because review of the issue would not be available on ultimate review of a cease and desist order in the court of appeals a decade or more hereafter, but also because such ultimate review, even if theoretically available, could not remedy the injury to Socal in being unlawfully haled into Commission proceedings in the first instance.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

GEORGE A. SEARS
RICHARD W. ODGERS
C. DOUGLAS FLOYD
Attorneys for Respondent

PILLSBURY, MADISON & SUTRO
Of Counsel

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No. 79-900

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HOWARD E. SHAPIRO
Deputy General Counsel
Federal Trade Commission
Washington, D.C. 20580

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1. Despite its disclaimer to the contrary (Resp. Br. 14), respondent would require the district court—during the pendency of ongoing adjudicatory proceedings—to conduct a factual inquiry to determine how the Commission went about exercising its discretion in deciding to issue an administrative complaint against respondent and seven other major oil companies. As we have demonstrated in our opening brief (at 23-48), this is precisely the sort of judicial inquiry that is barred by the discretionary function exception of the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Moreover, respondent's contentions confirm that any judicial inquiry into whether the Commission made a "reason to believe" determination is inseparable from the merits of what constitutes "reason to believe," and cannot

be conducted without probing the minds of the Commissioners. See *Boise Cascade Corp.* v. *FTC*, Civ. No. 80-305 (D. Del. Sept. 30, 1980), slip op. 9.

Respondent claims "not that the allegations of the Commission['s] complaint fail to state a claim on their face, but that the Commission failed to determine whether there was *any factual basis* for believing that [respondent] had violated section 5" (Resp. Br. 16 (emphasis added); see also *id.* at 17, 22; J.A. 15). In order to verify respondent's claim, the district court would first have to review the materials that were before the Commission when it voted to issue the complaint (see Resp. Br. 17). But this would be only the beginning of the inquiry. If the district court is to decide whether the Commission made a proper "reason to believe" determination, it presumably would also have to consider whether the materials before the Commission were sufficiently substantial or persuasive to support a finding that there was reason to believe that a violation had occurred (see Resp. Br. 18). Yet even the court of appeals held that review was foreclosed on this issue (J.A. 58).

The district court would next have to consider whether the Commissioners had personally made the necessary "reason to believe" determination. This would entail an inquiry into whether the Commissioners had adequately studied the materials, had deliberated sufficiently, both individually and collectively, and had refused to permit congressional concern over the then current oil shortage to become a dispositive factor in their decisions. This is, of course, the very kind of inquiry that this Court has consistently eschewed, absent extraordinary circumstances. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).[1]

[1] That such a probing of the Commissioners' minds would inevitably result from judicial review of whether a reason to believe determination had been made is indicated by the type of discovery respondent has signaled that it wishes to undertake. It poses the following hypothetical: "Suppose the Commission's files contain the memorandum of a Commissioner saying 'We do not have anything to indicate

2. Respondent nevertheless argues (Resp. Br. 31-32) that in the circumstances of this case an inquiry into the Commissioners' mental processes is appropriate because it has made a prima facie showing that the Commission ignored its statutory mandate by issuing the administrative complaint in response to extraneous political considerations and without making a determination of reason to believe that respondent had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Indeed, this is the central theme of respondent's brief (see Resp. Br. 1-8, 11, 16-17, 19, 21, 33). It is plain, however, that respondent errs both as a matter of pleading and as a matter of law.

Respondent has not pleaded a prima facie case, even assuming, arguendo, that the reason to believe standard in Section 5 of the FTC Act defines a judicially enforceable criterion. At most, the complaint alleges that the Commission instituted an investigation of firms in the petroleum industry, but did not for 17 months thereafter *directly* investigate the acts and practices of respondent by examining its officers and employees or reviewing its records; that Senator Jackson on May 31, 1973, requested the Commission to prepare a report within 30 days concerning the relationship between the structure of the petroleum industry and the then current shortages of petroleum products; that the Commission furnished to the Senator its *Preliminary Federal Trade Commission Staff Report on its Investigation of the Petroleum Industry* (hereinafter "Staff Report") on July 6, 1973, together with a statement indicating that the report had not been collectively evaluated or approved by the Commission; that Senator

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that [respondent] violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway'" (Resp. Br. 23). The only way that a reviewing court can be assured that such a document does *not* exist, of course, is to permit respondent discovery of the Commission's and of individual Commissioners' files concerning the deliberations. In fact, respondent requested such materials and numerous other documents in its "first request" for discovery and inspection in the district court (R. 56-59; "R." refers to the clerk's record in the court of appeals).

Jackson released the report on July 13, over the protest of the Commission; that on July 17, the Commission decided to issue its complaint; that the complaint was issued the following day, July 18, 1973; and that following the issuance of the complaint the Commission's staff sought extensive discovery to prepare the case for trial before an administrative law judge.

These allegations are simply insufficient to make out a case that the Commission did not exercise the required discretion and reasonably consider the facts in issuing the complaint, or that it improperly considered congressional pressures and political factors extraneous to an alleged violation of Section 5 of the FTC Act (J.A. 15). Thus, as a matter of law these allegations do not overcome the strong presumption against probing the minds of administrators concerning their deliberations. See *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974) (Friendly, J.).

A. Respondent has sought to create the impression that no investigation of SOCAL preceded the Commission's decision to issue its administrative complaint in this case. This contention is incorrect. The record shows that there was an extensive prior investigation. Respondent's complaint in the district court alleges (J.A. 6-7) that "[o]n December 21, 1971, the FTC issued a resolution stating its intention to institute an investigation of firms in the petroleum industry to determine whether such firms were engaged in unfair methods of competition or unfair acts or practices in violation of section 5 of the Federal Trade Commission Act (Docket No. 721-0047)." The subsequent history of that investigation is recounted in the Staff Report that was transmitted to Senator Jackson by the Commission's chairman on July 6, 1971.[2]

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[2] The Staff Report was subsequently published as a committee print (J.A. 9). Permanent Subcomm. on Investigations, Senate Comm. on Government Operations, 93d Cong., 1st Sess., *Investigation of the Petroleum Industry* (July 12, 1973). The Report was included in an appendix to the Commission's petition for rehearing en banc in the court of appeals.

As described in the Staff Report (at 5–6), subpoenas were initially issued to nine integrated petroleum firms. They were withdrawn, however, because of fear that the investigation would be delayed by protracted litigation over the validity of the subpoenas.[3] Instead, the Commis-

[3] This concern was subsequently confirmed when the adjudicatory proceeding began. Some 13 collateral cases, not including this one, have resulted from the opposition of the respondent oil companies to preliminary aspects of the proceeding. *Standard Oil Company of Indiana* v. *FTC*, 475 F. Supp. 1261 (N.D. Ind. 1979) (challenge to the administrative law judge's denial of respondents' discovery requests); *FTC* v. *Anderson*, 442 F. Supp. 1118 (D.D.C. 1977), aff'd, 1979–2 Trade Cas. (CCH) ¶ 62,837 (D.C. Cir. Sept. 17, 1979) (challenge to enforcement of FTC subpoenas related to the *Exxon* proceeding); *Exxon Corp.* v. *FTC*, 476 F. Supp. 713 (D.D.C. 1979) (Freedom of Information request for *Exxon*-related documents); *Exxon Corp.* v. *FTC*, 466 F. Supp. 1088 (D.D.C. 1978) (same); *Exxon Corp.* v. *FTC*, 436 F. Supp. 1012 and 1019 (D. Del. 1977), remanded, 588 F.2d 895 (3d Cir. 1978) (respondents sought protective order for certain documents subpoenaed during the *Exxon* proceeding); *Mobil Oil Corp.* v. *FTC*, 430 F. Supp. 855 (S.D.N.Y. 1977), rev'd, 562 F.2d 170 (2d Cir. 1977) (respondents sought order compelling FTC to file an Environmental Impact Statement before proceeding with the *Exxon* administrative proceeding); *Mobil Oil Corp.* v. *FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976); 430 F. Supp. 849 (S.D.N.Y. 1977) (Freedom of Information suit for *Exxon*-related documents); *Exxon Corp.* v. *FTC*, 411 F. Supp. 1362 (D. Del. 1976) (respondents objected to the administrative law judge's issuance of a preservation order); *Exxon Corp.* v. *FTC*, 384 F. Supp. 755 (D.D.C. 1974), remanded, 527 F.2d 1386 (D.C. Cir. 1976) (Freedom of Information request by respondents for *Exxon*-related documents); *Atlantic-Richfield Co.* v. *FTC*, 398 F. Supp. 1 (S.D. Tex. 1975), aff'd 546 F.2d 646 (5th Cir. 1977) (suit to prevent the FTC from issuing certain subpoenas duces tecum because the data may be used in the *Exxon* proceeding); *FTC* v. *Atlantic-Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977) (objection to enforcement of FTC subpoenas, in part because documents may be used in *Exxon* proceeding); *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 707–708 (D.C. Cir. 1978), cert. denied, 439 U.S. 958 (1978) (respondents opposed the line of business reports in part because the data may be used in the *Exxon* proceeding); *Standard Oil Company of Indiana* v. *FTC*, Civ. No. H–78–483 (N.D. Ind., filed June 24, 1980) (respondents in *Exxon* proceeding filed motion for further declaratory and injunctive relief).

A House Subcommittee which reviewed the case in 1976 charged "that many of the more than 100 pre-trial motions filed by respondents in the three years since the complaint was issued were without sub-

sion's staff used an alternative approach to gather data relating to the industrial practices of the major oil companies (Staff Report, at 5–6):

> The approach concentrated on obtaining information from the largest independent crude producers, refiners, and marketers. Extensive investigative work was done by the Commission staff which began with detailed questionnaires to crude producers, refiners, and marketers which were designed to elicit in depth the nature of the independents' relationships with major oil companies for the years 1967–1971, the last years in which complete data were available. In addition, a large number of firms in each category (crude producers, refiners, marketers) were requested to permit searches of their files by Federal Trade Commission economists and attorneys. Because not every company cooperated, data contained in this summary reflects only that which came from the more than 50 cooperating companies. Data were collected on a national basis, but it was later decided that the investigation should focus primarily on Districts 1 and 3 which could be identified as a separate identifiable market. In general, the surveyed firms were larger on the average than other independent entities in the industry.
>
> In addition to these data, the staff obtained substantial information on the petroleum industry from published public and governmental sources. The staff collected further valuable information from the Department of Interior, the Oil Import Appeals Board, the Interstate Commerce Commission, and other federal agencies. Various state taxing authorities and several state agencies such as the Texas Railroad Commission were contacted. These governmental agencies were cooperative in providing the requested information.

B. Respondent also seeks to create the impression (Resp. Br. 5–7) that, because the Commission's staff was

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stantial legal basis and were filed partly for the purpose of delay." Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Federal Regulation and Regulatory Reform* 76 (Comm. Print 1976).

not ready to proceed to trial before an administrative law judge immediately upon issuance of the administrative complaint, the Commission necessarily lacked reason to believe that a violation had occurred within the meaning of Section 5(b) of the FTC Act. The amount of information necessary to constitute reason to believe, however, is quite different from the amount of evidence necessary to prove a violation in the adjudicatory proceeding.

Section 5(b) of the Act does not provide any firm guidelines concerning the nature or quantum of evidence upon which an individual Commissioner must rely in determining "reason to believe." Rather, the statute invokes the experience, judgment and practical expertise of each individual Commissioner. The Staff Report, which was available for study by the individual Commissioners for at least 11 days after its release to Senator Jackson (J.A. 8–9), provided ample grounds in and of itself from which the Commissioners could reasonably have concluded that the major oil companies had illegally combined to monopolize the refining of crude oil, to maintain a monopoly over refining, and to maintain, individually and with each other, a non-competitive market structure in refining. See Staff Report, at 43.[4] But such a conclusion would not necessarily mean that the charges were ready for trial on the day the complaint was issued. Extensive discovery was required, and was sought by the staff, in order to convert the Commission's "reason to believe" based upon an ex parte investigation of SOCAL and other major oil companies[5] into a prima facie case. Under the scheme of the Act, the Commission must ultimately decide, on the basis of the record made before the administrative law judge in adversary proceedings, whether the violations which it had reason to believe occurred, have in fact been proved by substantial evidence on the record as

[4] The violations charged in the administrative complaint are phrased only in terms of injury to competition in the refining aspects of the petroleum industry (J.A. 25–26).

[5] The staff investigation used the term "major" to include some 18 vertically integrated firms, including SOCAL (Staff Report, *supra*, at 5 n.8).

a whole.[6] *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

C. Respondent's case is not strengthened by its allegations of congressional "pressure" based on Senator Jackson's request for a report from the Commission and the Commission's decision to honor that request. Indeed, the Commission is expressly charged by statute with the duty of submitting reports at the request of Congress. Section 6(d), (f), 15 U.S.C. 46(d), (f). Nor do respondent's allegations concerning the timing of the complaint show that the Commission was acting under outside pressure and could not have been able to ascertain the relevant facts and make a reason to believe determination prior to the issuance of the complaint. Congress has not imposed a time frame within which the Commission must study the facts and determine whether there is reason to believe that a violation of law has occurred. Cf. *National Nutritional Foods Ass'n* v. *FDA*, *supra*. Although the Commission's chairman, in his letter transmitting the report to Senator Jackson, wrote that "[t]his report has not been evaluated or approved by the Commission" (J.A. 30),

[6] Respondent's confusion of the two concepts is reflected in its emphasis on statements by complaint counsel that they had not obtained substantive document or data discovery from the respondents prior to issuance of the complaint (Resp. Br. 6 n.5), and by its incomplete citation of Commissioner Dixon's statement concerning the Commission's "readiness" when the complaint was issued (Resp. Br. 7). The Commissioner was simply expressing his opinion that had extensive investigative subpoenas been issued before the filing of the administrative complaint, enforcement of such subpoenas would have been easier than enforcement of post-complaint subpoenas. He stated, somewhat colorfully: "There is a hell of a lot of difference between the judicial subpena [sic] and investigative subpena. We issued a complaint here without being ready is one way to say it. You have to get ready for trial. Now we are talking about whether we shouldn't change the whole process and duplicate the Federal Rules of Civil Procedure." *Regulatory Reform, Consumer Product Safety Commission, National Highway Traffic Safety Administration, Federal Trade Commission: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., Vol. IV, 613 (1976). While it may be prudent practice to postpone the initiation of adjudicatory proceedings until a prima facie case has been developed, there is nothing in the FTC Act that mandates such a practice.

there is nothing in this letter or in any other material of record that suggests that individual Commissioners did not subsequently review the final report or that the Commission as a body had given no attention to the underlying data.

The remainder of respondent's allegations of "pressure" rest upon a newspaper article, prepared more than a year and a half after the events in question, that contains a statement, attributed to anonymous "congressional sources," that once the Staff Report was released the Commission was under "great political pressure to file a complaint" (J.A. 10, 36). While we do not deny that this article was in fact published, we submit that such a press report plainly does not suffice to overcome the presumption of regularity that attaches to the Commission's actions. Moreover, even if Senator Jackson or other members of Congress had urged the Commission to issue a complaint—and it is not alleged that they did—this would not be a proper basis for judicial review of the Commission's decision-making processes. As this Court stated in *Gravel* v. *United States*, 408 U.S. 606, 625 (1972), members of Congress "are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute * * *." Such "political pressure" is part of the give and take of our democratic system.

3. Respondent erroneously relies on dictum in *Marshall* v. *Jerrico*, No. 79-253 (Apr. 28, 1980), in support of its claim of reviewability. In *Jerrico*, the Court recognized (slip op. 10) that "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967)." It noted (slip op. 11), however, that "[i]n appropriate circumstances the Court has made clear that traditions of prosecutorial dis-

cretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law."

This statement does not support respondent's position here. With respect to the "improper factors" noted by the Court in *Jerrico*, it is obvious that due process principles may require review, at an appropriate stage, of administrative proceedings motivated by such factors as willful discrimination on racial or religious grounds, or brought for the personal benefit of the prosecutor. Reviewability of enforcement decisions "otherwise contrary to law" depends on what the specific law alleged to have been violated provides, not, as respondent contends (Resp. Br. 12–14), on general presumptions of reviewability. Otherwise, nothing would remain of the tradition of broad prosecutorial discretion so carefully preserved in *Jerrico*.

Our reading of *Jerrico* is confirmed by the cases cited by the Court in support of its statement. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), involved a statutory scheme (the Labor-Management Reporting and Disclosure Act of 1959) that required the Secretary of Labor either to file an action on behalf of disgruntled union members contesting an allegedly invalid union election, or to provide an adequate explanation of his refusal to proceed. Under the specific statutory scheme, the Secretary's refusal to act (or adequately to explain his refusal) had the effect of denying a specific right to individuals whom the statute was intended to benefit.[7] The denial of that right had an im-

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[7] Respondent contends (Resp. Br. 27–28) that the analysis of *Bachowski* in our opening brief (at 38–39) is erroneous. We disagree. While the Court in *Bachowski* held that the Secretary had "a heavy burden of overcoming the strong presumption that Congress did not mean to prohibit judicial review of his decision" (421 U.S. at 567), the Court was there addressing the Secretary's contention that the provisions of the LMRDA precluded judicial review, pursuant to 5 U.S.C. 701(a)(1). With respect to the contention that the decision not to file an action was an unreviewable exercise of prosecutorial discretion, the Court agreed with the reasoning of the court of appeals, which had rejected that contention. 421 U.S. at 567 n.7.

mediate and conclusive impact upon those protected individuals. That is not ordinarily true of an administrative decision to initiate a proceeding.

Similarly, in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939), the Court held reviewable a final determination of the jurisdictional status of a telephone common carrier. Writing for the Court, Mr. Justice Frankfurter observed that under traditional notions of judicial power, review of an administrative determination that does not of itself affect an individual "but only affects his rights adversely on the contingency of future administrative action" is either premature or wholly beyond the province of the courts. 307 U.S. at 130. As an example, he noted that "orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction * * * are not reviewable." *Ibid.*; footnote omitted.[8]

This case involves a challenge to the initiation of an administrative proceeding. The initiation of such a proceeding does not have a dispositive effect upon protected legal rights. It merely begins a process. Unlike the statute in-

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[8] None of the other cases cited in *Jerrico* as illustrations of situations in which enforcement decisions are reviewable involved review of the decision to initiate an administrative proceeding. See *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (reviewability of HEW Secretary's failure to carry out the mandate of Title VI of the Civil Rights Act); *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (reviewability of refusal by EPA Administrator to initiate proceedings to cancel a permit for the distribution of an allegedly dangerous pesticide); *Medical Comm. for Human Rights* v. *SEC*, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972) (reviewability of refusal by SEC to act on complaint by stockholders that their rights under Section 14 of the SEC Act were being violated); *Perez* v. *Boston Housing Authority*, 404 N.E. 2d 1231 (Mass. 1980) (power of equity court to appoint receiver to vindicate rights of tenants in a Public Housing Authority building project after the authority had demonstrated an institutional inability to comply with the court's orders).

volved in *Dunlop* v. *Bachowski*, *supra*, Section 5(b) of the FTC Act is not drawn in terms of specifically defined protections for the benefit of individuals or a defined class. Rather, the statute expressly provides for the vindication of broad societal interests.[9] Under the statute, the Commission is charged with the sole responsibility of initiating or declining to initiate proceedings. See, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967). Subject only to due process safeguards against invidious discrimination and similar improper behavior, its determinations in this respect are committed to its unreviewable discretion. *Ibid.*

[9] As we noted in our opening brief (at 27), "reason to believe" is one of two factors to be considered by the Commission under Section 5(b) of the FTC Act in issuing an administrative complaint. The other factor is whether the proceeding is in the "public interest." This factor is reviewable only to the extent of establishing that the controversy is not a mere private dispute. *FTC* v. *Klesner*, 280 U.S. 19, 24–25 (1929). Moreover, such review is available only after the issuance of a cease and desist order at the conclusion of the administrative process. Beyond this limited inquiry, however, the public interest determination is not reviewable at all, since it is the Commission, not the courts, which is responsible for determining the public interest. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9th Cir.), cert. denied, 270 U.S. 662 (1926); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

HOWARD E. SHAPIRO
Deputy General Counsel
Federal Trade Commission

OCTOBER 1980

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No. 79-900

IN THE

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OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, *et al.*,
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v.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION

July 11, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings in support of respondent. Consent to the filing of this brief has been obtained from counsel for the respondent, Standard Oil Company of California. However, consent has been refused by Wade H. McCree, Jr., counsel for the Federal Trade Commission and the United States, petitioners.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for

the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following recent cases: *Williams v. Zbaraz,* Nos. 79-4, 79-5, 79-491 (U.S., filed July 2, 1979); *Consolidated Edison Co. of New York v. Public Service Commission of State of New York,* No. 79-134 (U.S., filed July 27, 1979); *United Steelworkers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); and *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827 (U.S., filed Nov. 26, 1979).

WLF seeks to advance the interests of not only companies, but of all persons to be free of politically motivated legal harassment by instrumentalities of the federal government. WLF therefore finds that supporting the respondent in the instant case is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None

of the litigating parties is primarily focusing upon the broader question of the power of administrative agencies to issue complaints without finding substantial bases for their actions. WLF's sole concern in this case is to support the right of businesses to function freely within the free enterprise structure and to be responsible to the government only in cases of actual wrongdoing.

Regardless of the political or economic predilections of regulators, permitting external and irrelevant political pressures to influence the initiation of agency proceedings would establish a dangerous precedent. WLF seeks to eliminate such *ex parte* factors from all levels of the agency decision-making process. The integrity of the administrative process and the public's perception of its governmental agencies and personnel calls for the earliest resolution as possible to determine whether enforcement proceedings have been lawfully initiated.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR

1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION

July 11, 1980

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INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION, INC.

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The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the broader question of the power of administrative agencies to issue complaints without finding substantial bases for their actions. WLF's sole concern in this case is to support the right of businesses to function freely within the free enterprise structure and to be responsible to the government only in cases of actual wrongdoing.

Regardless of the political or economic predilections of regulators, agency actions affecting outside parties should have rational purposes and some facts to support particular decisions. Permitting external political pressures to influence agency proceedings would establish a dangerous precedent. WLF seeks to eliminate such *ex parte* factors from agency decision making.

STATEMENT OF THE CASE

This case has woven a tortuous path through administrative and judicial proceedings for most of a decade. In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the facts by the Ninth Circuit in the opinion below (J.A. 54-56).

ARGUMENT

I.

THE ISSUANCE OF AN ADMINISTRATIVE COMPLAINT IS "AGENCY ACTION" WITHIN THE MEANING OF 5 U.S.C. § 701

The Court of Appeals below correctly concluded that the issuance of the administrative complaint by the Federal Trade Commission (FTC) against the Standard Oil Company of California (SOCAL) was "agency action" within the meaning of 5 U.S.C. §§ 551(13) and 702. (J.A. 56-57). The issuance of an administrative complaint triggers the adjudicative process at the agency level entailing costly legal expenses and resources. The decision by the FTC to issue such a complaint and the ensuing proceedings impose "significant burdens" on SOCAL, even if the company should ultimately prevail at the conclusion of those proceedings or after judicial

review of an adverse administrative order. *See Marshall v. Jerrico*, ___ U.S. ___, 48 U.S.L.W. 4485, 4488 (1980).

The petitioners argue that the issuance of an administrative complaint is not "agency action" because it "does not require the respondent to do or refrain from doing anything save respond." (Pet. Brief at 19). Yet, the nature of the response required, the penalties for failure to do so, and the ensuing administrative proceedings impose an enormous burden and cost not only on the respondent, but on the agency, and ultimately, on the taxpayers and consumers as well.

In another respect, *amicus* submits that issuance of the administrative complaint is "agency action" in this case since that issuance was preceded by the FTC's denial of SOCAL's petition filed in January 1974 to dismiss the administrative complaint. The "denial" of "relief" by the agency to a petitioner is also "agency action." 5 U.S.C. §§ 551(13), 551(11)(C).[1]

Finally, if, as petitioners must admit, that the failure to initiate an administrative complaint or prosecution is "agency action" (*Dunlop v. Bachowski*, 421 U.S. 560), *amicus* submits that it follows that a decision to issue a complaint is *a fortiori* "agency action."

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[1] 5 U.S.C. § 551(13) provides:

"[A]gency action includes the whole or part of an agency rule, order, license, sanction, *relief* or the equivalent *or denial thereof*, or failure to act." [Emphasis added.]

5 U.S.C. § 551(11)(C) states that:

" 'relief' includes the whole or a part of an agency—

(C) taking of other action on the application or petition of, and beneficial to, a person."

For any or all of these reasons, the court below correctly concluded that the issuance of the FTC's administrative complaint is "agency action." The only remaining consideration is whether that action is final agency action subject to judicial review or whether it is within the discretion of the agency to prosecute a respondent for any reason, or for no reason at all.

II.

THE INTEGRITY OF THE ADMINISTRATIVE PROCESS REQUIRES IMMEDIATE JUDICIAL REVIEW TO DETERMINE WHETHER AN AGENCY HAD REASON TO BELIEVE A VIOLATION OCCURRED IN LIGHT OF SUBSTANTIAL ALLEGATIONS TO THE CONTRARY

Although it is well recognized that an agency may have a certain amount of prosecutorial discretion in deciding whether or not to initiate enforcement proceedings, the agency must follow the procedures specified by Congress in the agency's organic statute. There is a presumption of judicial review of agency action or inaction. *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). In this case, the FTC is required by Section 5(b) of the Federal Trade Commission Act to determine first that there is "reason to believe" that a violation of the Act occurred before it may begin its lengthy adjudicative proceedings.[2]

The FTC must demonstrate that its complaint was a consequence of "a justifiable basis for believing, derived

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[2] 15 U.S.C. § 45(b) provides in pertinent part:

Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition . . . it shall issue and serve upon such . . . corporation a complaint stating the charges. . . .

from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that ". . . [there was a] violation of the Act." *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747-48 (7th Cir. 1951).

Because of the timing of the issuance by the FTC of its administrative complaint and the political circumstances surrounding it (J.A. 54-56), SOCAL claims that the FTC did not make the requisite "reason to believe" determination. As the court below summarized it:

> In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made. [J.A. at 59]

Although the FTC complaint number 8934 is dated July 18, 1973 and signed by the Secretary to the FTC, there is no indication whatsoever from the record whether the FTC Commissioners *in fact* deliberated and voted to find "reason to believe" and, if so, the date of such meeting, and the existence of any dissenting votes or absentees at the time of the alleged vote.

Amicus submits that in situations such as those presented in the instant case suggesting impropriety by the agency in issuing its complaint and the failure to find the requisite "reason to believe", the public interest is best served by a impartial judicial determination as to whether or not the agency found "reason to believe" a violation occurred or whether it had none at all, but was merely responding to political pressures. If that issue were not initially resolved, it would cast a pall over the entire adjudicative proceedings, tainting the integrity of the FTC and its personnel. Indeed, even the FTC's

Administrative Law Judge recommended to dismiss the hastily drawn complaint against SOCAL (J.A. 55-56).

It should also be in the interest of the FTC to have this issue resolved at the outset in order to proceed with its adjudicative proceedings in a timely and orderly fashion. *Amicus* believes that if the FTC has properly found "reason to believe" that a respondent has violated antitrust laws, it is in the public interest that adjudicative proceedings should be prompt and appropriate remedies fashioned if antitrust violations are found by the Administrative Law Judge. As it now stands, the FTC has fought this case for nearly a decade on an issue that it could have easily resolved at the beginning, a situation which belies the FTC's purported concern that the reviewability of the existence *vel non* of the requisite "reason to believe" would diminish the effectiveness of the agency's enforcement powers.

The petitioner's suggestion that judicial review of the "reason to believe" determination is available at the end of the administrative proceeding is an empty one. (Pet. Brief at 55). In the first place, if such a review is available, the amount of time to litigate that issue should be approximately the same regardless of whether it is litigated "up front" or at the end of the FTC proceedings. Thus, if the FTC should prevail on that issue, the same amount of time would be tacked on to the entire enforcement proceedings before any cease and desist order would actually take effect. Secondly, *amicus* suggests that the availability of review at the end of the proceedings might well become an academic question. Costly administrative and legal expenses would be saved through an earlier determination by the court as to the legal sufficiency of the complaint. If, as seems probable, the FTC complaint was promulgated without a "reason

to believe" determination, the FTC proceedings could cease at once. As Circuit Judge Tang stated for the court below:

> SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable.
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> [J.A. at 61.]

As recognized by the court below, the finality provision, 5 U.S.C. § 704, should be interpreted in a flexible and practical way (J.A. at 60) (cases cited omitted). *Amicus* submits that the Court of Appeals did not err in applying the finality provision in the flexible manner that it did. To foreclose review in these circumstances could possibly foreclose review of other agency actions that initiate enforcement proceedings without complying with the requisite "reason to believe" determination.

For example, the Federal Election Commission must first find "reason to believe" a violation occurred before it can begin its enforcement proceedings. 2 U.S.C. § 437g. This statutory safeguard to the public of unwarranted FEC investigations would be meaningless if the FEC, based upon some political motivation, were able to launch a time-consuming and politically damaging investigation of a candidate or committee without finding "reason to believe." As long as the respondent in such agency proceedings has sufficient reasons to demonstrate that the agency failed to follow statutory prerequisites, an early review should and must be available to the respondent.

Petitioner's basic policy argument is that preliminary reviews would hamstring this and other agencys' enforcement powers. (Pet. Brief at 35, n.21; 47). As noted earlier, the amount of time needed to review the issue in question, whether before or after the agency proceedings, would be the same. Secondly, challenges to the agency's determination of whether it had "reason to believe" should be relatively rare since most agency proceedings are conducted with regularity and with justification so as to not to suggest that the proceedings were unlawfully instituted. Thirdly, any such challenge might be foreclosed if the agency, even amidst controversial cases, made it crystal clear to the respondent the bases and evidence upon which it made a "reason to believe" determination and the actual vote of such determination. Finally, in those rare cases where review is sought, the reviewing court need not probe the mind of the administrators, although that may be justified under certain circumstances. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). Instead, the court need only examine the statement of reasons proffered by the agency and the basic facts allegedly supporting the finding of "reason to believe." At that point, a judge could quickly and easily determine whether the agency found "reason to believe" or not.

In a situation where an agency has been granted discretion by law, its decisions are usually exempt from judicial scrutiny. However, where "there has been a *prima facie* demonstration of impropriety the court will inquire into the administrative process in order to insure that the decision-making was informed, unbiased and personal." *KFC National Management Corp. v. NLRB,* 497 F.2d 298, 305 (2d Cir. 1974), Courts will intervene

to overturn arbitrary and capricious agency decisions.[3]

Agencies have often compared their administrative decisionmaking to "prosecutorial discretion" in criminal proceedings. However, courts will nevertheless review arbitrary agency actions to prevent unfair application of the law.[4] The Supreme Court has recently stressed that "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement

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[3]Section 706 provides that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of *law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

See Standard Oil Co. of Cal. v. FTC, 596 F.2d at 1386; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 413-14; *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970); *DeVito v. Shultz*, 300 F. Supp. 381, 382-83 (D.D.C. 1969); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-51 (1967); *Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200, 202 (4th Cir. 1964); *Moog Industries v. FTC*, 355 U.S. 411, 414, *rehearing denied*, 355 U.S. 968, 356 U.S. 905 (1958); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562-63 (1919).

[4]*Medical Comm. for Human Rights v. SEC*, 432 F.2d at 673. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978); *United States v. Falk*, 479 F.2d 616, 618-21 (7th Cir. 1973); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall v. Jerrico,* 48 U.S.L.W. at 4488.

The presence of bias or undue external pressure upon agency decision-makers has been cited by courts as reasons to review and set aside particular administrative actions. For example, in *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231 (D.C. Cir.), *cert. denied,* 405 U.S. 1030 (1972), the Secretary of Transportation was in a position to determine whether federal funds were to be employed to construct a highway bridge over the Potomac River. Several Congressmen publicly declared their opposition to Washington, D.C. subway construction unless the Three Sisters Bridge project received funds. The subsequent decision by Secretary Volpe to build the bridge was invalidated by the Court of Appeals for the D.C. Circuit. The court held that "the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations." *Id.* at 1248. Political pressure by the Attorney General upon the proceedings of the Board of Immigration Appeals was found by the Supreme Court in *United States v. Shaughnessy,* 347 U.S. 260 (1954), as a justification for setting aside agency action.[5]

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[5]*See also Jewel Cos. v. FTC,* 432 F.2d 1155 (7th Cir. 1970), where the Seventh Circuit court found that the reasoning a FTC Commissioner had in voting for the issuance of a complaint could be reviewed immediately without the promulgation of a final agency order. The issue of disqualifying FTC Commissioners for bias is explored in several cases including *Ass'n of Nat'l Advertisers, Inc. v. FTC,* 48 U.S.L.W. 2433 (D.C. Cir. 1979), and *Pillsbury Co. v. FTC,* 354 F.2d 952 (5th Cir. 1966), *cert. denied,* 48 U.S.L.W. 3820 (U.S. June 17, 1980).

Amicus stresses that the instant case reveals a prime example of outside political pressure influencing agency decisionmaking. Senator Jackson asked the FTC, at a time when gasoline shortages first surfaced during peacetime, to fully investigate a complex industry and issue a report within a month. The result of this pressure was a hastily drafted unofficial report. Public pressure increased when the draft was published as a Committee print. It is apparent that the abrupt Commission decision to issue a complaint (shortly after FTC Chairman Engman's statement that the agency investigation should not be rushed) was politically motivated. In its desire to please a Senator and maintain a "tough" public image, the FTC has allowed improper considerations to affect its actions. This abuse of administrative discretion at this critical stage of the administrative proceedings is ripe for a searching judicial review.

CONCLUSION

The Federal Trade Commission may not issue a formal complaint unless it has "reason to believe" that violations of the law have taken place. Although courts will not review the determination by administrative agencies that a violation has occurred, judicial intervention should occur in order to determine whether a reason to believe decision has been made at all in light of serious allegations to the contrary. *Amicus* submits that it is in the public interest for both the respondent and the agency to have this threshold issue resolved at the outset, and, accordingly, urge this Court to affirm the Court of Appeals.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION *

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*David H. Stonehill, Program Attorney for the Washington Legal Foundation, assisted in the preparation of this brief.